



THIRTY-EIGHTH PARLIAMENT

REPORT 44

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

REPORT ON

**CRIMINAL CODE AMENDMENT (IDENTITY
CRIME) BILL 2009**

Presented by Hon Adele Farina MLC (Chairman)

March 2010

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“8. Uniform Legislation and Statutes Review Committee

- 8.1 *A Uniform Legislation and Statutes Review Committee* is established.
- 8.2 The Committee consists of 4 Members.
- 8.3 The functions of the Committee are -
- (a) to consider and report on Bills referred under SO 230A;
 - (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to review the form and content of the statute book;
 - (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
 - (f) to consider and report on any matter referred by the House or under SO 125A.
- 8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

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Government Response

This Report is subject to Standing Order 337:

After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.

The four-month period commences on the date of tabling.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW
IN RELATION TO THE
CRIMINAL CODE AMENDMENT (IDENTITY CRIME) BILL 2009

Recommendations

1 Recommendations are grouped as they appear in the text at the page number indicated:

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Finding 1: The Committee finds that the Bill gives effect to the intergovernmental agreement, evidenced by SCAG records, that the Australian jurisdictions will implement the SCAG Model Criminal Code (SCAG Model Criminal Code IGA) (Standing Order 230A(1)(a)).

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Finding 2: The Committee finds that in providing for offences related to identity crime, and being particularly directed at fraud, the Bill gives effect to the Multi-Jurisdictional Crime IGA (Standing Order 230A(1)(a)).

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Finding 3: The Committee finds that the Bill addresses the same subject matter as that addressed by sections 3.3.5, 3.3.6 and the unnumbered section of the SCAG Model Criminal Code and is in essentially identical terms (Structure of Uniform Legislation - structure 2) (Standing Order 230A(1)(b)).

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Finding 4: The Committee finds that the Bill is uniform legislation to which both subparagraphs of Standing Order 230A(1) apply.

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Recommendation 1: The Committee recommends that the responsible Minister advise the Legislative Council whether the offences proposed by the Bill will apply in the event a person:

- makes, supplies or possesses identification information in Western Australia with the intent of committing (or facilitating the committal of) an offence in another country; or
- makes, supplies or possesses identification information in another country with the intent of committing (or facilitating the committal of) an offence in Western Australia.

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Finding 5: The Committee finds that proposed sections 490-2 are akin to the existing exceptions to the general principle that the criminal law should not apply to persons who are suspected of being about to commit an offence unless there has been an incitement or an attempt.

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Finding 6: The Committee finds that there is a lack of parity between the maximum penalty applying to an offence under the Bill's proposed sections 490, 491 and 492 and the penalties for existing offences involving a greater degree of criminal behaviour under *The Criminal Code*.

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Finding 7: The Committee finds that it is undesirable that sections 490, 491 and 492 proposed by the Bill will in many circumstances carry a greater penalty than the related attempt and conspiracy offences or even commission of the intended indictable offence.

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Recommendation 2: The Committee recommends that the responsible Minister provide the Legislative Council with an explanation as to why the maximum penalties imposed by proposed sections 490 to 492 are not limited so as not to exceed the penalty that might be imposed for attempting the intended indictable offence to which the relevant offences relate.

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Recommendation 3: The Committee recommends that the responsible Minister provide the Legislative Council with an explanation as to why the maximum penalties imposed by proposed sections 490 to 492 are higher than those recommended by the SCAG Model Criminal Code and, with the exception of New South Wales, higher than those imposed by the other Australian jurisdictions.

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Recommendation 4: The Committee recommends that the responsible Minister provide an explanation to the Legislative Council as to why:

- section 10D of *The Criminal Code* has not been amended to include a reference to the preparatory offences proposed by clause 5 of the Bill; and
- it is not proposed to insert provisions equivalent to sections 10E and 10F of *The Criminal Code* in respect of the preparatory offences proposed by clause 5 of the Bill.

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Recommendation 5: The Committee recommends that the responsible Minister clarify for the Legislative Council:

- the legal requirements, if any, for institutions and government agencies to act on receipt of a certificate that a person is a victim of identity crime; and
- the consequences of an institution or government agency relying on a false or wrongly issued certificate.

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Recommendation 6: The Committee recommends that the responsible Minister advise the Legislative Council whether any steps are being taken to ensure the inter-jurisdictional recognition of certificates issued in Western Australia.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

CRIMINAL CODE AMENDMENT (IDENTITY CRIME) BILL 2009

1 REFERENCE

- 1.1 The Criminal Code (Identity Crime) Bill 2009 (**Bill**) was introduced to the Legislative Council on 19 November 2009 by Hon Michael Mischin MLC, Parliamentary Secretary to the Attorney General.¹ On 26 November 2009, the Bill (which is **Appendix 1**) stood referred to this Committee pursuant to Standing Order 230A.²
- 1.2 Standing Order 230A requires the Committee to report within 30 days of referral. Due to the recess of Parliament, the reporting date for the Bill is, in effect, the first sitting day of 2010, being 2 March 2010.

2 INQUIRY PROCEDURE

- 2.1 The Committee advertised its inquiry into the Bill in *The West Australian* on 5 December 2009 and wrote to stakeholders (a list of whom is attached at **Appendix 2**) on 8 December 2009. Details of the Committee's inquiry were also published on its website.
- 2.2 The Committee wrote to the Attorney General on 3 December 2009, requiring provision of the supporting documents in respect of the Bill.

Supporting documents

Provided by the Attorney General

- 2.3 The Attorney General provided the Committee with a copy of the Standing Committee of the Attorneys-General (**SCAG**) *Model Criminal Law Officers' Committee Final Report on Identity Crime, March 2008 (2008 Identity Crime Report)* on 16 December 2009.

¹ Hon Michael Mischin MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9411.

² Hon Barry House MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 November 2009, p9849.

Identified through Committee research

- 2.4 The Committee identified the following additional supporting documents:
- 2.4.1 SCAG Model Criminal Code Officer's Committee Final Report on Credit Card Skimming Offences 2006 (**2006 Credit Card Skimming Report**);
 - 2.4.2 Commonwealth of Australian Governments (**COAG**) Intergovernmental Agreement on Terrorism and Multi-Jurisdictional Crime, April 2002 (**Multi-Jurisdictional Crime IGA**);
 - 2.4.3 COAG Intergovernmental Agreement to a National Identity Crime Strategy, April 2007 (**Identity Crime Strategy IGA**);
 - 2.4.4 SCAG Annual Report 2003-2004;
 - 2.4.5 Summary of SCAG meeting July 2007;
 - 2.4.6 Summary of SCAG meeting March 2008;
 - 2.4.7 Summary of SCAG meeting July 2008;
 - 2.4.8 Summary of SCAG meeting April 2009; and
 - 2.4.9 SCAG Model Criminal Code.

Submissions

- 2.5 The Committee received submissions from the following entities:
- Australian Bankers' Association Inc;
 - Australian Finance Conference;
 - Department of Commerce;
 - Office of Deputy Commissioner, Western Australia Police; and
 - The Law Society of Western Australia.

2.6 The Committee thanks all entities for their assistance in its inquiry into the Bill.

Hearing

2.7 The Committee held a hearing on 8 February 2010 with:

2.7.1 Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General; and

2.7.2 Mr Luke Hoare, Policy Officer, Department of the Attorney General.

2.8 The Committee thanks the witnesses for their assistance in its inquiry into the Bill.

3 FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

3.1 The establishment of a Committee to scrutinise uniform legislation arose from the concern that the Executive is, in effect, exercising supremacy over a State Parliament when it enters agreements that, in practical terms, bind a State Parliament to enact legislation giving effect to national uniform schemes or intergovernmental agreements.³

3.2 Due to the limited information available to the Parliament in respect of negotiations for a uniform scheme, the purpose of the Committee is not only to identify any provisions of uniform legislation that detract from the powers and privileges of Parliament but (to the extent necessary and possible within the limited time available for its inquiry) provide the Parliament with the rationale for, and practical effect of, the uniform legislation.

3.3 Related to the limited availability of information is the lack of opportunity for the Parliament to constructively review uniform legislation from a technical perspective.⁴

3.4 When scrutinising uniform legislation, the Committee considers, amongst other things, various fundamental legislative scrutiny principles. Although not formally adopted by the Legislative Council as part of the Committee's Terms of Reference, the Committee applies these principles as a convenient framework for constructive review.⁵ These principles are set out in **Appendix 3**.

4 THE CRIMINAL CODE AMENDMENT (IDENTITY CRIME) BILL 2009

Overview

4.1 Clause 5 is the substantive clause of the Bill. It amends *The Criminal Code* to introduce offences of:

³ See generally the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004.

⁴ Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report No. 10, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles*, 31 August 1995, pvi.

⁵ Further background on the fundamental legislative scrutiny principles can be found in: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, November 2004, pp4-9.

- making, using or supplying “*identification material*” (section 490);
- possession of “*identification material*” (section 491); and
- possession of any thing capable of being used to make, use supply or retain “*identification material*” (section 492),

when that is accompanied with the intent that the identification material be used (whether by the person making, supplying, using or possessing the identification material or some other person) to commit, or facilitate the committal of, an indictable offence.⁶

4.2 “*Identification material*” is:

- (a) *identification information; or*
- (b) *a record that contains identification information.*

(Section 489)

4.3 “*Identification information*” is defined to be:

information relating to a person, whether living or dead or whether real or fictitious, that is capable of being used, whether alone or in conjunction with other information, to identify or purportedly identify the person and includes - ...

(Section 489).

4.4 There follows a non-exhaustive list of examples of identification information, which includes modern technological matters such as:

- (f) *biometric data;*
- (g) *voice print;*
- (h) *information stored on a credit card or debit card; and*
- (j) *digital signature,*

⁶ An indictable offence is one that is triable only on indictment (that is, in the District Court or Supreme Court of Western Australia), unless a written law provides otherwise. (Sections 5 and 67 of the *Interpretation Act 1984*, section 3 of *The Criminal Code* and section 3 of the *Criminal Procedure Act 2004*.) These tend to be the more serious offences.

and a personal identification number (PIN), as well as name, address, Australian Business Number and passport or driver's licence numbers and information identifying a person as another's relative.

- 4.5 Clause 5 of the Bill also proposes a section, section 494, which provides that a court may, on conviction of a person for identity crime, issue a certificate to the victim of that crime confirming the occurrence of the crime.
- 4.6 The new offences are directed at "*the misappropriation and misuse of another person's identity*", which was described by Hon Michael Mischin MLC in the Second Reading Speech to the Bill as a "*most invidious and sophisticated criminal activity*".⁷
- 4.7 Hon Michael Mischin MLC noted that automatic teller machine (ATM) skimming - the act of electronically capturing information that can be used to confirm another's identity for the purpose of stealing money from the victim's bank account - was merely the most high profile example of identity crime.⁸ The ambit of "*identity crime*" is, in fact, far-reaching.

Identity Crime

Introduction

- 4.8 The Identity Crime Strategy IGA makes the following distinctions between identity crime, fraud and theft:

"Identity crime" is a generic term to describe activities/offences in which a perpetrator uses a fabricated identity, a manipulated identity, or a stolen/assumed identity to facilitate the commission of crime.

"Identity fraud" is the gaining of money, goods, services or other benefits or the avoidance of obligations through the use of a fabricated identity, a manipulated identity, or a stolen/assumed identity.

"Identity theft" is the theft or assumption of a pre-existing identity (or a significant part thereof), with or without consent, and whether, in the case of an individual, the person is living or deceased.⁹

⁷ Hon Michael Mischin MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9411.

⁸ Ibid.

⁹ Intergovernmental Agreement to a National Identity Crime Strategy, April 2007, pp2-3.

4.9 These definitions are referred to in the 2008 Identity Crime Report. However, there is no universally accepted definition of “*identity crime*” and the terms are often used interchangeably.¹⁰

Range of behaviours constituting identity crime

4.10 The Australasian Identity Crime Policing Strategy 2003 - 2005 provides the following explanation of “*identity crime*”:

‘Identity crime’ is a broad term used to describe offences in which a perpetrator uses a false identity in order to facilitate the commission of a crime. Identity crime can underpin and facilitate a range of crimes including people smuggling, drug trafficking, money laundering, paedophilia, terrorism and murder, but is most commonly typified by identity fraud.

Identity fraud generally involves the gaining of money, goods, services or other benefits through the use of a false identity and can include, but is not limited to, the following types of criminal activity:

- . counterfeiting and skimming of credit cards;*
- . the use of stolen credit cards or credit card numbers;*
- . fraudulently obtaining money, loans, finance and credit;*
- . fraudulently obtaining benefits, pensions or entitlements; and*
- . evading the payment of taxes, levies or other debts.¹¹*

4.11 The following instances of identity crime illustrate the variety of behaviours that constitute identity crime:

- an offender found and killed a homeless man so he could fake his own death and avoid prosecution;¹²
- falsified documents being presented to the Department of Commerce in order to obtain an occupational licence, in particular an electrician’s licence;¹³

¹⁰ Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on Identity Crime, March 2008*, p7.

¹¹ Australasian Centre for Policing Research, National Identity Crime Policing Strategy 2003-2005 of the Police Commissioners Conference Electronic Crime Steering Committee, March 2003, p1.

¹² Australasian Centre for Policing Research, National Identity Crime Policing Strategy 2003-2005 of the Police Commissioners Conference Electronic Crime Steering Committee, March 2003, p1.

¹³ Letter from Mr Brian Bradley, Director General, Department of Commerce, 6 January, p2010.

- \$5 million was stolen from bank accounts using automatic teller machines in New South Wales, Victoria, Canada, Great Britain, the United States, India and Malaysia, in the targeting of Western Australian McDonald outlets (allegedly by British and Canadian nationals) using EFTPOS skimming devices;¹⁴
- using up to 50 false identities to obtain home loans, an offender and accomplice netted \$7 million from banks and financial institutions in Victoria, New South Wales and the Australian Capital Territory;¹⁵ and
- in 2001, Australian airports were used as transit points in an immigration racket between Asia and the United States, with stolen identities being used to purchase airline tickets in Australia.¹⁶

4.12 The inter-jurisdictional, and international nature, of identity crime is apparent from these examples.

4.13 The Commonwealth Department of the Attorney General particularly focuses on terrorism and border control:

*The misuse of false or stolen identities underpins terrorist and criminal activity. It also undermines border and citizenship controls and efforts to combat the financing of crime and terrorism.*¹⁷

4.14 The 2008 Identity Crime Report observed:

*It has been recognised that organised crime groups are becoming increasingly involved in identity crime; for example, to facilitate the smuggling or trafficking of people. The 9/11 hijackers used fictitious social security numbers, false identities and fraudulent identification documents. A report issued by the French Senate in 2005 indicates that terrorist networks have systematically used false identity documents to obtain employment overseas, finance activities and avoid detection.*¹⁸

¹⁴ WA Today, *Alleged EFTPOS skimmer faces Perth court*, 23 December 2009, <http://www.watoday.com.au> (viewed on 7 January 2010).

¹⁵ Australasian Centre for Policing Research, *National Identity Crime Policing Strategy 2003-2005* of the Police Commissioners Conference Electronic Crime Steering Committee, March 2003, p6.

¹⁶ *Ibid*, p6.

¹⁷ Commonwealth Department of the Attorney General, *Protecting Identity Security*, http://www.crimeprevention.gov.au/agd/WWW/ncphome.nsf/Page/Identity_Theft (viewed on 8 December 2009).

¹⁸ Standing Committee of the Attorneys-General *Model Criminal Law Officers' Committee Final Report on Identity Crime, March 2008*, p5.

- 4.15 In 2004, the United Nations Economic and Social Council issued resolution number 26, calling on member states (of which Australia is one) to address identity crime through the Convention against Transnational Organized Crime.¹⁹ The United Nations has subsequently undertaken a number of studies and issued a number of more specific resolutions relating to particular aspects of identity crime, including cybercrime.²⁰

Technology

- 4.16 Increasingly, technology is enabling identity crime and rendering territorial and jurisdictional boundaries inadequate barriers to its commission.²¹ In their paper, *An Identity Fraud Model Categorising Perpetrators, Channels, Methods of Attack, Victims and Organisational Impacts*, Jamieson et al observe:

*Increasingly, the mode of attack for the fraud, especially the identity fraud perpetrator is tending to rely on electronic commerce or mechanical/digital devices to initialise the identity theft or identity deception act.*²²

- 4.17 The Australian Finance Conference also attributed “*an increasing incidence of fraud*” perpetrated through false identity to technological developments.²³

¹⁹ Being: “*Convinced also that the criminal misuse and falsification of identity is commonly associated with other illicit activities, including money-laundering, of organized criminal groups, corruption and terrorism and that the proceeds of fraud are used to finance such activities*”. United Nations Economic and Social Council Resolution 2004/26: http://www.unodc.org/documents/organized-crime/ECOSOC_res_2004_26.pdf (viewed on 1 January 2010).

²⁰ In 2007, the Economic and Social Council published a report: *International cooperation in the prevention, investigation, prosecution and punishment of fraud, the criminal misuse and falsification of identity and related crimes*, and the issue was addressed at the 2008 Conference of the Parties to the United Nations Convention against Transnational Organized Crime. (Report on the Fourth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, October 2008: <http://www.unodc.org/documents/treaties/COP2008/CTOC-COP2008-13-E.pdf> (viewed on 1 January 2010).

²¹ The Australian Finance Conference also attributes the rise in identity crime to technological advances and “*perceived privacy concerns*” limiting avenues to verify information provided by customers. (Submission No. 4 from Australian Finance Conference, 11 January 2010, p1.)

²² Jamieson R, Stephens G and Winchester D, *An Identity Fraud Model Categorising Perpetrators, Channels, Methods of Attack, Victims and Organisational Impacts*, Pacific Asia Conference on Information Systems 2007 Proceedings, p9 for the impacts on business. (Available World Wide Web URL <http://www.aisel.aisnet.org/cgi/viewcontent.cgi?article=1084&content=pacis2007>, viewed 7 January 2010.) The Australasian Identity Crime Policing Strategy stated: “*The proliferation of identity crime has been linked to the expansion of technology and in particular, ready access to desktop scanning and publishing applications and Internet access*” (p7).

²³ Submission No. 4 from Australian Finance Conference, 11 January 2010, p1.

Detection issues

- 4.18 Detecting identity crime prior to theft or fraud occurring is a problem. As noted above, the 2008 Identity Crime Report observed that victims may not become aware that their identity has been assumed until some time after the event.
- 4.19 Reporting of identity crime is also a problem:

Identity fraud victims, however, are often even more reluctant to call law enforcement than other business victims. Reasons for businesses non disclosure include: loss of reputation, large financial losses, and extended court proceedings (refer, Jamieson, Stephens, & Winchester 2007, for more details).²⁴

Impact of identity crime

- 4.20 The 2008 Identity Crime Report observed:

The Australian Institute of Criminology reported that approximately one quarter of incidents involving fraud reported to the Australian Federal Police involve ‘the assumption of false identities’. Identity Fraud in Australia, a 2003 report by the Securities Industry Research Centre of Asia–Pacific (SIRCA) for financial intelligence agency AUSTRAC, claimed that identity fraud cost Australian large business \$1.1 billion in 2001–02.²⁵

- 4.21 In the Second Reading Speech, the House was advised that the Australian Crime Commission and the Australian Payments Clearing Association estimate that credit card skimming and credit card fraud generally costs the Australian economy between \$100 million and \$145 million.²⁶
- 4.22 Identity crime has both direct and indirect financial impact on business and individuals:

For business organisations, the direct financial impacts can include the cost of reporting and investigating identity crime cases, the cost of preventing the continued use of the identity, and the cost of restoring the business or organisation’s reputation.

²⁴ Jamieson R, Land L, Stephens G and Winchester D, *Identity Crime: the Need for an Appropriate Government Strategy*, Forum on Public Policy, 2008, p6. (Available World Wide Web URL: <http://www.forumonpublicpolicy.com/archivespring08/jamieson.pdf> (viewed 7 February 2010).)

²⁵ Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on Identity Crime, March 2008*, p9.

There may also be indirect financial impacts, in the form of damage to a person's credit rating, the creation of a criminal record in the person's name, and the efforts spent restoring records of transactions or credit history. For example, a victim may not become aware that identity crime has occurred until he or she is called upon by defrauded creditors to make good on defaulted loan payments. It has been claimed that individual victims of identity crime spend an average of two or more years attempting to fix their credit report and restore their credit rating.²⁷

- 4.23 The problems experienced by victims of identity crime, to which proposed section 494 can be seen to be directed, are also noted to be significant by the Australasian Identity Crime Policing Strategy:

the emergence of identity theft brings with it additional problems of victimisation for the person whose name has been 'stolen'. These problems centre on the victim undoing the damage that has been caused to their name and reputation, with many victims needing to spend large amounts of time and resources convincing banks, financial institutions and other agencies that they were not responsible for the fraudulent activity that occurred in their name.

...

Identity crime may facilitate access to citizenship and/or social services such as medical services. It may also enable an offender to acquire a professional affiliation or qualification.²⁸

- 4.24 The submission of the Office of Deputy Commissioner, Western Australia Police drew attention to the problems experienced by victims of identity crime:

Experience has shown that identity crime victims have little recourse to re-establish their financial and personal credibility once their identities have been stolen or used by offenders and that this effect may last for years. In some instances it may take many months, if not years, to convince financial institutions and investigating authorities

²⁶ Hon Michael Mischin MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9411.

²⁷ Standing Committee of the Attorneys-General *Model Criminal Law Officers' Committee Final Report on Identity Crime, March 2008*, pp4-5. See also Jamieson R, Stephens G and Winchester D, *An Identity Fraud Model Categorising Perpetrators, Channels, Methods of Attack, Victims and Organisational Impacts*, Pacific Asia Conference on Information Systems 2007 Proceedings, p9, for the impacts on business. ([Http://www.aisel.aisnet.org/cgi/viewcontent.cgi?article=1084&content=pacis2007](http://www.aisel.aisnet.org/cgi/viewcontent.cgi?article=1084&content=pacis2007), viewed 7 January 2010.)

²⁸ Australasian Centre for Policing Research, National Identity Crime Policing Strategy 2003-2005 of the Police Commissioners Conference Electronic Crime Steering Committee, March 2003, pp1-2.

*that an offence has been committed and that it should be investigated. Then any subsequent investigation and court case, if the offender is apprehended, can also take years.*²⁹

- 4.25 A person's identity is integral to their sense of self. There are therefore also less tangible costs of identity crime:

*Identity crime can invade a person's privacy and sense of individuality. It can create trauma, stress and reduced participation in society for individual victims; for example, the suffering caused to a family following the theft of the identity of a stillborn child, or the impact of the use of one family member's identity by another family member.*³⁰

Additional introductory information in respect of clause 5 of the Bill

- 4.26 All offences proposed by clause 5 are indictable but offences of possession of identification material and identification equipment may be tried summarily.
- 4.27 The proposed offences are 'preparatory' offences - no act or omission giving effect to the intention to commit (or facilitate the committal of) the indictable offence is required to trigger the application of the offence provisions. It is also not relevant to the proposed offences that it is, in fact, not possible to commit the intended indictable offence.³¹
- 4.28 Proposed section 493 provides that section 552(1) of *The Criminal Code* (which states that attempting to commit an indictable offence is a crime) will not apply to the new offences created by the Bill. A person cannot, therefore, be charged with, for example, possession of identification information for the purpose of attempting to commit an indictable offence.
- 4.29 The maximum penalty³² for the offence of making, supplying or using identification material (section 490) is the greater of seven years imprisonment or the penalty that would have applied if the person had been convicted of attempting the intended indictable offence.

²⁹ Submission No. 5 from Office of Deputy Commissioner, Western Australia Police, January 2010, p7.

³⁰ Standing Committee of the Attorneys-General *Model Criminal Law Officers' Committee Final Report on Identity Crime, March 2008*, p5.

³¹ Proposed sections 490(2), 491(2) and 492(3).

³² Section 9(2) of the *Sentencing Act 1995* provides that unless a statutory penalty of a particular amount or particular term of imprisonment is mandatory or includes a minimum penalty, a lesser penalty of the same kind may be imposed.

4.30 The maximum penalty for offences of possessing identification material (section 491) or possessing identification equipment (section 492) is:

- on conviction on indictment - five years imprisonment; or
- on summary conviction - 24 months imprisonment and a fine of \$24,000.

4.31 Section 494 confers power on a court that convicts a person of an identity crime offence to issue a certificate to the victim of that offence setting out:

- the offence to which the certificate relates;
- the name of the victim;
- any matter the court considers relevant; and
- any other matter prescribed in regulations.

Purpose of the Bill

4.32 In the Second Reading Speech in the Legislative Council, Hon Michael Mischin MLC, advised that:

*In creating these offences the Government's intention is to target preparatory behaviour to the offence of fraud,*³³

and stated that the Bill “*would protect*” against identity crime.³⁴

4.33 To the extent that the creation of an offence creates a deterrent, or in the event a person is apprehended prior to misusing the identity material, the Bill can be seen as protecting against identity theft or fraud. The Bill does not, however, create an offence of identity crime *per se* (that is, an offence of assuming another's identity).

4.34 More obviously than a protection measure, the Bill can be understood as addressing difficulties in prosecuting, under the law as it currently stands, behaviour which is seen by the government (and all Australian jurisdictions through SCAG decisions and the Multi-Jurisdictional Crime IGA) as warranting criminal sanction.³⁵

4.35 In the Second Reading Debate of the Bill in the Legislative Assembly, the Attorney General stated that:

³³ Hon Michael Mischin MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9412.

³⁴ Ibid, p9411.

³⁵ In describing the uniform scheme below, the Committee has made reference to the Identity Security Strategy IGA, which is more clearly directed at protection of identity.

But I will say it again, so that it is on the record for the purposes of this bill, and in case this debate is ever looked at for the purpose of interpretation, that the problem sought to be cured by this bill is the fact that it would be very difficult to prove an attempt to an offence in a circumstance in which a person was in possession of material that was otherwise innocuous.³⁶

4.36 The Attorney General explained how this problem arose under current legislation:

It is the case all the time that each of us receives the sort of material that is listed in this bill as being identification information. ... That sort of information is transferred all the time.

...

... every day we go to stores such as a video store and they ask to look at our driver's licence, and often they photocopy it. ... if we were to find in a person's house 15 of those slips of paper [credit card imprints taken from a bin], we might have a very strong suspicion that the person was up to no good, but had the person done something that we might be able to charge the person with as an attempt? Under section 4 of the Criminal Code, an "attempt" means that the person has intent to commit an offence, and the person has begun to put his intent into execution by doing an act that is more than merely preparatory to the commission of the offence, but the person has not fulfilled the intent to such an extent as to commit an offence. ... even if we could prove beyond reasonable doubt that the person had intent to commit the offence of stealing, it would be difficult to prove that the person had done something more than merely preparatory just by taking those slips of paper out of the bin. ... Under this legislation, if we could get across the hurdle of proving the intent to commit an offence, the fact that a person was in possession of another person's identification material or information would give rise to at least the possibility that there would be an appropriate offence for which to prosecute that person.³⁷

4.37 The Committee notes that the offences as formulated in the Bill also appear to address a further barrier to successful prosecution in establishing responsibility for fraud or theft committed by electronic means. That is: demonstrating it was the accused person who committed the indictable offence which it is intended be committed

³⁶ Hon Christian Porter MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 November, p4975.

³⁷ *Ibid*, pp9475-6.

through possession of the identification material. In their paper *Identity Crime: the Need for an Appropriate Government Strategy*, Jamieson et al said:

... According to identity theft complaints received by the US Federal Trade Commission (FTC) from November 1999 to September 2001, over 60% (58,078) of methods used by identity fraud perpetrators were unknown, and in only 20.5% (19,241) of complaints were the methods known (FTC 2006).³⁸

- 4.38 Where it is clear that an offence such as fraud has occurred, but the method and perpetrator cannot be identified to the standard of certainty required for a conviction of that offence, a person may nonetheless be charged with a related preparatory offence.

Submissions

- 4.39 All submissions made to the Committee expressed general support for legislation addressing the problem of identity crime and the Bill.
- 4.40 However, the submissions raised some technical issues in the drafting and effect of certain provisions of the Bill. These issues are dealt with in Parts 8 to 11 below.

5 THE BILL - INTERGOVERNMENTAL AGREEMENTS/UNIFORM SCHEME

Introduction

- 5.1 The Bill was not identified as uniform legislation in the Second Reading Speech.
- 5.2 In his response to the Committee's standard letter requesting supporting documents and information in respect of the uniform scheme, the Attorney General advised:

a) The Bill was not the result of a formal written intergovernmental agreement. Rather, the Bill utilises and builds upon (but does not specifically implement) the recommendations and draft provisions in the Model Criminal Law Officers' Committee (MCLOC) final Report "Identity Crime" (March, 2008).

As you may be aware, MCLOC receives references from the Standing Committee of Attorneys-General (SCAG) and subsequently produces a discussion paper, receives public comments and submissions, and publishes a final report. SCAG considers that report and it is a

³⁸ Jamieson R, Land L, Stephens G and Winchester D, *Identity Crime: the Need for an Appropriate Government Strategy*, Forum on Public Policy, 2008, p2. (Available World Wide Web URL: <http://www.forumonpublicpolicy.com/archivespring08/jamieson.pdf> (viewed 7 February 2010).)

matter for each jurisdiction as to whether they implement the recommendations and draft provisions and, if so, to what extent.

This process has been followed for several years and is an aspect of the development of a Model Criminal Code which has, to varying extents, been adopted in some jurisdictions, for example, by the Commonwealth Parliament.

...

e) The Bill does not constitute part of a “legislative scheme” as that concept is understood and utilised. As indicated above, there is no intergovernmental agreement or decision of SCAG that each jurisdiction will, or must, implement identity crime legislation or enact, and implement, uniform legislation following the recommendations and draft provisions in the final report. That is, this is not, for example, cooperative model uniform Commonwealth/State/Territory legislation or template legislation.³⁹

- 5.3 The Committee has, therefore, been required to review the question of whether there is a SCAG intergovernmental agreement in respect of implementing a model criminal code or uniform scheme to which the Bill is giving effect by reason of its subject matter.
- 5.4 The documents referred to below use inconsistent terminology, with “*identity crime*”, “*identity theft*” and “*identity fraud*” being used interchangeably.⁴⁰ Because of this, use of a particular term in this Part of the report indicates the terms used in the document to which reference is at that point being made, rather than indication of a particular meaning.
- 5.5 A related concept and term is that of “*identity security*”, which refers to preventive measures designed to protect identity.

Intergovernmental Agreement in Respect of National Model Criminal Code

- 5.6 SCAG placed development of a national model criminal code on its agenda on 28 June 1990.⁴¹ SCAG records of the time are not available to the Committee but

³⁹ Letter from Hon Christian Porter MLC, Attorney General, 15 December 2009, pp1 and 2.

⁴⁰ The Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on Identity Crime*, March 2008, states: “*There is no universally accepted definition of identity crime. In Australia and overseas, the term is often used interchangeably with the terms ‘identity fraud’ and ‘identity theft’ to cover a broad range of conduct involving the unauthorised or improper use of personal identification information*” (p7).

⁴¹ Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on Identity Crime*, March 2008, p1.

from other sources, all Australian jurisdictions agreed (whether at the meeting or subsequently) that a national model criminal code would be completed by 1998⁴² and implemented by 2001.⁴³

5.7 The primary aim in developing a national model criminal code was codification but:

*Uniformity is a secondary aim. The focus is on deficiencies and disparities among the Commonwealth and the States and Territories. The objectives are 'consistency and efficiency'. Noting the fact that there are nine jurisdictions with distinct approaches to ... crime, the proponents point to the need for certainty and equality before the law in all jurisdictions, the need to respond to interstate and international crime, and the need to reduce the potential for costs arising out of interstate litigation.*⁴⁴

5.8 SCAG established a committee (consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters) to develop the model criminal code. This committee was first known as the Model Criminal Code Officers Committee (MCCOC) and, later, the Model Criminal Law Officers Committee (MCLOC).⁴⁵

5.9 Between 1992 and 2008, the MCCOC (and then MLCOC) presented a series of Final Reports for SCAG setting out model provisions in respect of various offences for inclusion in the Model Criminal Code.

5.10 Despite the anticipated implementation deadlines having passed,⁴⁶ SCAG continued to refer areas of criminal activity to the MCCOC/MLCOC for formulation of model provisions and continued to endorse the Final Report recommendations and draft provisions as provisions of a national model criminal code.

5.11 In April 2003, SCAG tasked the MCCOC with developing model credit card skimming offences as:

⁴² McDonald G, *Towards a National Criminal Law: An overview of the model criminal code project, Reform*, Vol. 64, 1995/96, p 17.

⁴³ Second Reading Speech to the Criminal Code Bill 1995, Hon Duncan Kerr, House of Representatives, Commonwealth of Australia, *Hansard Debates*, 1 March 1995, p 1331.

⁴⁴ McDonald G, 1995/96, op cit, p. 18, quoted in Parliament of Australia, Parliamentary Library, Bills Digest No. 105 1999-2000, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, November 1999, pages unnumbered: <http://www.aph.gov.au/library/Pubs/BD/1999-2000/2000bd105.htm> (viewed 8 January 2010).

⁴⁵ Standing Committee of the Attorneys-General *Model Criminal Law Officers' Committee Final Report on Identity Crime*, March 2008, p1.

⁴⁶ As Matthew Goode said: "It may not have a good record of implementation by the end of 1999 - or even the target year of 2001. But that is no great cause for concern. In an enterprise of this kind, one must take the longer view" (Matthew Goode, 'The Model Criminal Code Project', *Australian Law Librarian*, Vol. 5(4), 1997, p 273).

The availability of sophisticated ‘skimming’ devices, and increasingly widespread use of electronic, telephone and Internet banking, have contributed to the growing incidence of credit and debit card fraud.⁴⁷

- 5.12 In March 2004, SCAG released a discussion paper prepared by the MCCOC in respect of both credit card skimming and “*identity theft*”⁴⁸ and in July 2004 the MCOCC was given additional instructions by SCAG to look at “*identity crime*” more broadly, as:

Responding to identity crime was identified as a priority matter in the Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime, dated 5 April 2002.⁴⁹

- 5.13 By the Intergovernmental Agreement on Terrorism and Multi-Jurisdictional Crime, all jurisdictions agreed:

*20. To undertake as a matter of priority work in the following areas of law enforcement: control over the illegal importation of criminal contraband specifically illicit drugs and firearms; extradition between States; recognition of expert evidence (such as drug analysis certificates); firearms trafficking; **identity fraud**; vehicle rebirthing; gangs; and cyber crime. The purpose of this work is to ensure elimination of administrative and legal barriers in pursuit of criminals operating in more than one jurisdiction.⁵⁰*

(Committee’s emphasis)

- 5.14 In February 2006, SCAG approved the 2006 Credit Card-Skimming Report, and a model provision, section 3.3.5, was inserted into the SCAG Model Criminal Code creating the offence of dishonestly obtaining or dealing (which includes: possessing, making, supplying or using) with a person’s personal financial information. This provision of the SCAG Model Criminal Code is **Appendix 4**.

⁴⁷ Standing Committee of the Attorneys-General *Model Criminal Code Officers’ Committee Final Report on Credit Card Skimming Crime*, February 2006, piii.

⁴⁸ The SCAG Annual Report of 2003/4, states: “*Credit Card Skimming – Ministers released a discussion paper (prepared by MCOCC at Ministers’ request) on credit card skimming and identity theft for public consultation*”. (Available World Wide Web URL: http://www.scag.gov.au/lawlink/ll_scag.nsf/pages/scag_annual_reports (viewed on November 2009).)

⁴⁹ Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on Identity Crime*, March 2008, p1.

⁵⁰ Intergovernmental Agreement on Terrorism and Multi-Jurisdictional Crime, p2.

- 5.15 With this report, development of the national model criminal code was seen as being “largely complete”.⁵¹
- 5.16 The MCLOC report on identity crime remained outstanding. The MCLOC presented the 2008 Identity Crime Report in March 2008, which was endorsed by SCAG at its meeting that month. The following model provisions, therefore, became part of the SCAG Model Criminal Code:
- section 3.3.6 *Identity Fraud* - providing definitions of terms, including “*identification information*”; and the offences of “*dealing*” in identification information and possession of identification information with the intention of committing, or facilitating the committal of, an indictable offence; and
 - unnumbered section *Certificate may be Issued by Local Court* - providing for the issue of a certificate to victims of identity fraud.⁵²

The relevant provisions of the SCAG Model Criminal Code are **Appendix 5**.

- 5.17 The SCAG Model Criminal Code is a public document on SCAG’s website, where it is identified as a “*Model Law*”.⁵³
- 5.18 In the interim, the attention of SCAG had turned to implementation.
- 5.19 The summary of the SCAG meeting of July 2007 refers to a MCLOC “*Model Criminal Code implementation report*” and records instructions to MCLOC to prepare an “*implementation plan*”.
- 5.20 The summary of the SCAG meeting of March 2008 again refers to a “*Model Criminal Code implementation report*” and notes “*the priorities identified by COAG on 5 April 2002*”. It was agreed at the March 2008 meeting that “*a review paper would be prepared examining the implementation priorities of MCLOC*”.
- 5.21 It appears that consensus could not be reached on joint implementation priorities. The summary of the SCAG meeting of July 2008 states:

Ministers:

...

⁵¹ Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on Identity Crime*, March 2008, p1.

⁵² This is not stated in the publicly available SCAG records, although it is an implication arising from those records that the 2008 Identity Crime Report recommendations were endorsed. Ms N Marsic, Executive Officer of the Standing Committee of the Attorneys-General has confirmed that the relevant provisions were approved by SCAG and form part of its Model Criminal Code. (Letter from Ms Natalie Marsic, Executive Officer of the Standing Committee of the Attorneys-General, 12 February 2010, p1.)

⁵³ See: http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws.

agreed that each jurisdiction should identify its own priorities for future Model Criminal Code implementation.

5.22 The summary of the SCAG meeting of April 2009 states:

Identity crime

Ministers noted Western Australia raised issues regarding credit card skimming offences and is considering enacting an offence of possessing skimming machines.

5.23 That the Western Australian Attorney General reported to SCAG in April 2009 on a proposal to implement a matter addressed by the Model Criminal Code, and that that proposal was recorded in the very brief summaries of SCAG meetings that are made public documents, appears consistent with the existence of an intergovernmental agreement to implement the Model Criminal Code.

5.24 The witnesses at the hearing acknowledged the relevance of the SCAG Model Criminal Code provisions to the Bill. Mr Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, advised the Committee:

we are pretty lucky in this regard because not only have we had the benefit of the two MCLOC reports, which are learned documents produced by that committee — they of course have undertaken a massive consultation in the process of arriving at that decision — we have also, of course, had the benefit of being a little bit behind the (sic) some of the other states and we are learning from what they have done. The result of that is that we think that this proposed legislation is slightly better.

...

Because the members of MCLOC consulted in their own jurisdictions extensively in order to come up with their final report, the consultation in a sense left for the bill based on that was just with the State Solicitor's Office.⁵⁴

5.25 The witnesses also provided evidence as to the uniform nature of the scheme to which the Bill is giving effect.

5.26 Where a Western Australian is the victim of an identity crime occurring in another state, that person is expected to rely on equivalent provisions of the legislation in other

⁵⁴ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p9.

states to obtain a certificate of victimisation.⁵⁵ In the event a person makes, supplies or possesses identification information in Western Australia with the intent of committing (or facilitating the committal of) an offence in another Australian jurisdiction or country, the person may be liable to prosecution under legislation in that other jurisdiction but not in Western Australia: in the event a person makes, supplies or possesses identification information in another jurisdiction with the intent of committing (or facilitating the committal of) an offence in Western Australia, the person is liable to prosecution under the offences proposed by the Bill.⁵⁶

- 5.27 That there is no deadline for implementation is not unusual for uniform legislation.⁵⁷ There may be many reasons why each jurisdiction would identify its own priorities for implementation.

Consistency

- 5.28 As indicated by the SCAG July 2008 agreement as to “*future Model Criminal Code implementation*”, the jurisdictions have implemented (to varying degrees) its provisions as they were developed.
- 5.29 An example of all jurisdictions implementing particular provisions is the introduction by all jurisdictions of legislation relating to genital mutilation following SCAG endorsement, in July 1995, of Model Genital Mutilation provisions set out in the MCCOC Final Report on that problem. Western Australia enacted its provisions in 2003.⁵⁸
- 5.30 Implementation of the SCAG Model Criminal Code provisions has not always been in uniform terms.
- 5.31 On this point, the Commonwealth Parliamentary Library Bill Digest on the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cwlth) states:

The 'rhetoric' surrounding the Model Criminal Code and the Criminal Code Act contains an implicit tension between 'consistency' and 'uniformity'. There were early indications that the focus would be on

⁵⁵ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, and Mr Luke Hoare, Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, pp5-6.

⁵⁶ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p9.

⁵⁷ The Committee notes, for example, that the uniform regime applicable to the Petroleum and Energy Legislation Amendment Bill 2009 (also the subject of a current Committee inquiry) sets no deadline for implementation.

⁵⁸ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 12, *Criminal Code Amendment Bill 2003*, 2 December 2003.

'consistency'⁵⁹ but there were also strong suggestions in the discussion papers and reports that the intention was to achieve 'uniformity'.⁶⁰ The Second Reading Speeches are equivocal.⁶¹ It may be the case that the original intention was 'uniformity' but that this was reduced to 'consistency' following fallout over particular parts of the Model Criminal Code,⁶² apparent schisms within MCCOC⁶³ and general slippage in the implementation timetable. The result is that there is now more flexibility for each jurisdiction to adopt and adapt relevant provisions. The danger is that this approach may weaken the structure and function of the code and reduce the ability of the code to achieve its original policy objectives.⁶⁴

(The footnotes to this extract are the original footnotes, not Committee comment.)

- 5.32 Since at least 1996, the Parliament has identified as uniform intergovernmental agreements/schemes which require adoption of “*essentially identical*” legislation (Structure of Uniform Legislation - structure 2) and “*unilateralism*” (structure 7 - described as each jurisdiction going its own way).⁶⁵

⁵⁹ Following the Gibbs Committee Report, an international conference did question the virtue of diversity, however, the major domestic seminar considered the issue and expressly rejected 'uniformity' in favour of 'consistency': Goode, 1992, op cit, at p 7. The conference was the Third International Criminal Law Congress held in Hobart in 1990. The seminar was organised by the Society for the Reform of the Criminal Law and was held in Brisbane in 1991.

⁶⁰ See for example MCCOC, *General Principles of Criminal Responsibility - Report*, op cit, p ii.

⁶¹ The Second Reading Speech for the original Bill referred to 'uniformity' (Criminal Code Bill 1995, Second Reading Speech, Hon. Duncan Kerr, House of Representatives, *Debates*, 1 March 1995, p 1331. See also McDonald, op cit, p 17). While the Second Reading Speech for this Bill refers to 'uniformity' it does so only in relation to penalties for related Commonwealth offences (Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, Second Reading Speech, the Hon. Darryl Williams, House of Representatives, *Debates*, 24 November 1999, p. 12463).

⁶² There has been criticism of the Model Criminal Code in a range of areas including its treatment of criminal responsibility (discussed above), age of consent in sexual offences (see generally Jackie Saisithidej, 'Sexual Assault Law Reform and the Uniform Criminal Code', *Reform*, vol. 68, pp 16-17), serious drug offences (Brian McConnell, Model Criminal Code: Critique by Families and Friends for Drug Law Reform of the Serious Drug Offences Discussion Paper, October 1997 at <http://www.adca.org.au/ffdlr/Resources/mcc.htm>).

⁶³ The Queensland Attorney-General withdrew participation from the Committee in May 1997. The departure was apparently related to the controversy over the Sexual Offences Discussion Paper: Goode, 1997, op cit, p. 266. (NB - Queensland did participate in the MLCOC's Identity Crime Report).

⁶⁴ Parliament of Australia, Parliamentary Library, Bills Digest No. 105 1999-2000, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, November 1999, pages unnumbered: <http://www.aph.gov.au/library/Pubs/BD/1999-2000/2000bd105.htm> (viewed 8 January 2010). A similar criticism has been levelled at 'uniform' consumer credit and companies legislation.

⁶⁵ As footnote 22 to the passage cited in paragraph 5.31 notes, undoubtedly uniform legislation such as consumer credit and corporation legislation are “*consistent*”, rather than “*uniform*”. The Committee's recent report on the Professional Standards Amendment Bill 2009 dealt with an intergovernmental agreement that required consistent legislation. (Western Australia, Standing Committee on Uniform Legislation and Statutes Review, Report No. 42, *Professional Standards Amendment Bill 2009*, 19 November 2009.)

- 5.33 Ambiguity as to whether consistency or exact uniformity is required is not in itself a barrier to the existence of a uniform legislative scheme.
- 5.34 The Committee considers that consistency, rather than strict uniformity, with the SCAG Model Criminal Code is what is required by the SCAG IGA.
- 5.35 While there are some differences in drafting styles between the SCAG Model Criminal Code provisions addressing credit card skimming and identity crime and the provisions of the Bill, and the Bill's term "*identification information*" may be wider than the term "*record*" used in the SCAG Model Criminal Code, these are not in the Committee's opinion significant variations and the provisions are essentially identical.
- 5.36 As referred to in the summary of the SCAG meeting of March 2008 and seen in paragraphs 5.12, 5.13 and 5.20 above, the development of the credit card skimming and identity crime provisions for the Model Criminal Code, and various jurisdictions' discretion as to individual implementation priorities, was and is impacted by a further intergovernmental agreement, the Agreement on Terrorism and Multi-Jurisdictional Crime, dated 5 April 2002, which lists "*identity fraud*" as an area for priority action.
- 5.37 In providing for offences related to identity crime, and being particularly directed at fraud, the Bill also gives effect to the Multi-Jurisdictional Crime IGA.

Uniform scheme - Australasian Policing Strategy and National Identity Security Strategy IGA

- 5.38 In 2002, the Police Commissioners' Conference agreed to develop a national policing strategy on identity crime. The Australasian Identity Crime Policing Strategy was released in March 2003. It identified that:

*regulatory and legislative reform is needed at the jurisdictional, national, and international levels;*⁶⁶

as:

An effective regulatory and legislative framework is essential in countering increases in identity crime in Australasia. This is particularly the case with identity theft which is not, in its own right, presently subject to sanction under the criminal law of any Australasian jurisdiction, other than in the context of it being part of a substantive fraud offence or some other crime. An effective framework is needed to ensure an ability to arrest and prosecute for identity crimes (and in particular identity theft offences) and to

⁶⁶ Australasian Centre for Policing Research, National Identity Crime Policing Strategy 2003-2005 of the Police Commissioners Conference Electronic Crime Steering Committee, March 2003, p5.

*provide support mechanisms that allow the victims of identity theft to obtain reparation and redress.*⁶⁷

(Original emphasis)

5.39 In particular that strategy called upon:

*Australasian police jurisdictions and their strategic partners need to put in place mechanisms that provide immediate and effective assistance to victims of identity theft, both in terms of reporting the offence and providing ongoing assistance.*⁶⁸

5.40 Noting that “*strategic partners*” were simultaneously addressing identity crime, the Police Commissioners’ Conference saw an opportunity to contribute to the contemporaneous legislative reform.⁶⁹

5.41 Preventative measures in respect of identity crime are also being addressed.

5.42 On 27 September 2005, COAG agreed to the development and implementation of a National Identity Security Strategy to better protect the identity of Australians.⁷⁰ This strategy is directed at enhancing government identification and verification processes and developing other measures to combat identity crime and was formalised in writing in 2007 by the National Identity Security Strategy IGA.

5.43 The Australasian Consumer Fraud Taskforce was established in March 2005 (comprising all the governmental regulatory agencies and departments in Australia and New Zealand that have responsibilities for consumer protection) to “*enhance enforcement activity against frauds and scams*” and “*generate greater interest in research on consumer frauds and scams*”. It links with non-government organisations and the private sector to raise awareness of the problem of identity fraud. In 2009 it conducted the ACFT Fraud Fortnight campaign.⁷¹

5.44 The Minister for Police identified the Bill as a “*huge, big thing*” in cooperation between the states on organised crime and high-tech crime in the context of a question on the priorities for the Ministerial Council for Police and Emergency Management.⁷²

⁶⁷ Ibid, p25.

⁶⁸ Ibid, p13.

⁶⁹ Ibid, p25.

⁷⁰ COAG Communique 27 September 2009.

⁷¹ Australian Competition and Consumer Commission, Scamwatch website <http://www.scamwatch.gov.au/content/index.phtml/ItemId/725675> (viewed on 8 January 2010).

⁷² Hon R F Johnson MLA, Minister for Police, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9464.

- 5.45 While the Bill does not implement the National Identity Security Strategy IGA *per se*, and the Committee has not, in the time available to it, had an opportunity to consider whether the Australasian Identity Crime Policing Strategy constitutes an intergovernmental agreement for the purposes of Standing Order 230A or whether the Ministerial Council for Police and Emergency Management has entered into a relevant intergovernmental agreement, this history illustrates the intergovernmental, uniform nature of the scheme in respect of identity crime, in which legislation - including the Bill - plays a role.
- 5.46 It also illustrates the complexity of the intergovernmental environment to which the Bill gives effect and with which its provisions interlock.

Conclusion

- 5.47 In respect of this history, the Attorney General states:

*SCAG considers that report [that is, an MCCOC/MCLCO report] and it is a matter for each jurisdiction as to **whether** they implement the recommendations and draft provisions and, if so, to what extent.*⁷³

(Committee's emphasis)

- 5.48 SCAG's actions throughout the period from 1990 to 2009, however, appear predicated on an underlying agreement to implement a national model criminal code. It is noted that the SCAG discussion through 2007 and 2008 was in terms of agreeing the priorities for implementation of the Model Criminal Code, not whether that code should be implemented.

- 5.49 The Attorney General states:

*e) The Bill does not constitute part of a "legislative scheme" as that concept is understood and utilised. As indicated above, there is no intergovernmental agreement or decisions of SCAG that each jurisdiction will, or must, implement identity crime legislation or enact, and implement, uniform legislation following the recommendations and draft provisions in the final report. That is, this is not, for example, cooperative model uniform Commonwealth/State/Territory legislation or template legislation.*⁷⁴

- 5.50 Standing Order 230A(1) has two parts. Standing Order 230A(1)(b) is an alternate paragraph to (1)(a). It does not rely on the existence of a formal intergovernmental

⁷³ Letter from Hon Christian Porter MLC, Attorney General, 15 December 2009, p1.

⁷⁴ Ibid, pp1 and 2.

agreement for its application. It applies to a Bill that “*by reason of its subject matter*” introduces a “*uniform scheme or uniform laws*”. (Committee’s emphasis)

- 5.51 The picture that emerges in respect of the subject matter of the Bill - identity crime - is that of a uniform scheme (founded in intergovernmental agreements) directed at combating identity crime, fraud and theft which involves a number of different agencies. The introduction of uniform (that is, reasonably consistent) laws in all jurisdictions (and hence the SCAG Model Criminal Code provisions) is an integral part of that broader uniform scheme.
- 5.52 The Bill gives effect to a multilateral intergovernmental agreement to implement the SCAG Model Criminal Code in each jurisdiction in accordance with the legislative priorities of the particular jurisdiction (Standing Order 230A(1)(a)).

Finding 1: The Committee finds that the Bill gives effect to the intergovernmental agreement, evidenced by SCAG records, that the Australian jurisdictions will implement the SCAG Model Criminal Code (SCAG Model Criminal Code IGA) (Standing Order 230A(1)(a)).

- 5.53 The Bill also gives effect to the multilateral intergovernmental Agreement on Terrorism and Multi-Jurisdictional Crime and National Identity Crime Strategy, April 2002 (Standing Order 230A(1)(a))

Finding 2: The Committee finds that in providing for offences related to identity crime, and being particularly directed at fraud, the Bill gives effect to the Multi-Jurisdictional Crime IGA (Standing Order 230A(1)(a)).

- 5.54 By reason of its subject matter, the Bill introduces a uniform scheme and uniform laws throughout the Commonwealth (Standing Order 230A(1)(b)).

Finding 3: The Committee finds that the Bill addresses the same subject matter as that addressed by sections 3.3.5, 3.3.6 and the unnumbered section of the SCAG Model Criminal Code and is in essentially identical terms (Structure of Uniform Legislation - structure 2) (Standing Order 230A(1)(b)).

- 5.55 The Bill is uniform legislation to which both subparagraphs of Standing Order 230A(1) apply.

Finding 4: The Committee finds that the Bill is uniform legislation to which both subparagraphs of Standing Order 230A(1) apply.

6 SOVEREIGNTY OF STATE PARLIAMENT

- 6.1 An issue the Committee examines in considering uniform legislation is whether, in practical terms, an intergovernmental agreement or uniform scheme to which a bill relates, or provision of a uniform bill itself, derogates from the sovereignty of the State.
- 6.2 In a sense, all uniform legislation has this effect. As the Standing Committee on Uniform Legislation and General Purposes pointed out in its Report No. 19:

Where a State Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.⁷⁵

- 6.3 The Standing Committee on Uniform Legislation and General Purposes identified derogation in State Parliament sovereignty in: fiscal imperatives to pass uniform legislation; limited time frames for consideration of uniform legislation; and lack of notice and detailed information as to negotiations inhibiting Members formulating questions and performing their legislative scrutiny role.⁷⁶ (This is not an exhaustive list of the ways in which State sovereignty might be impinged by uniform agreements or schemes.)

- 6.4 Again in its Report No. 19, the Standing Committee on Uniform Legislation and General Purposes said:

it is important to take into account the role of the Western Australian Parliament in determining the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws.

⁷⁵ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 19, *Uniform Legislation and Supporting Documents*, 27 August 2004, p11.

⁷⁶ Ibid.

2.8 The Committee, while prevented by the standing orders from examining the policy behind a uniform law, is in a position to alert the Council to the constitutional issues associated with particular forms of uniform laws as they are introduced.⁷⁷

6.5 The Committee has concluded that the Bill raises no particular constitutional issues.

7 IDENTIFICATION OF SO230A BILLS

Failure to identify the Bill as uniform legislation

7.1 As has been reported above, the Bill was not identified as uniform legislation by the Attorney General.

7.2 In its Report No. 19 - *Uniform Legislation and Supporting Documents*, the Standing Committee on Uniform Legislation and General Purposes advised of steps that it had taken to improve the identification of uniform legislation. The Bill was identified by the processes initiated by the Committee.⁷⁸

Attorney General's position

7.3 In his response to the Committee's standard letter requesting supporting documents and information in respect of the uniform scheme, the Attorney General advised:

e) The Bill does not constitute part of a "legislative scheme" as that concept is understood and utilised. As indicated above, there is no intergovernmental agreement or decisions of SCAG that each jurisdiction will, or must, implement identity crime legislation or enact, and implement, uniform legislation following the recommendations and draft provisions in the final report. That is, this is not, for example, cooperative model uniform Commonwealth/State/Territory legislation or template legislation.⁷⁹

7.4 This paragraph of the letter from the Attorney General reflects the advice of the former Attorney General in respect of the Standing Committee on Uniform Legislation and General Purposes' inquiry into the Criminal Code Amendment Bill 2003, which was the subject of its Report No. 12. In 2003, the former Attorney General advised that there was no there was no 'national scheme' as such, rather, a

⁷⁷ Ibid, p10.

⁷⁸ Ibid, p23.

⁷⁹ Letter from Hon Christian Porter MLC, Attorney General, 15 December 2009, pp1 and 2.

cooperative approach to MCLOC Final Reports on - in that inquiry - sexual servitude and female genital mutilation.⁸⁰

- 7.5 Nonetheless, the Standing Committee on Uniform Legislation and General Purposes noted SCAG decisions endorsing relevant MCCOC Final Reports⁸¹ and found:

Although various provisions in the Bill do not reflect any particular one of the identified structures, those provisions are 'uniform legislation' within the meaning of standing order 230A by virtue of being pursuant to an informal intergovernmental agreement to which the Government of the State is a party: standing order 230A(1)(a).⁸²

- 7.6 The former Committee's finding is consistent with the approach taken by both previous and subsequent Committees scrutinising uniform legislation. Standing Order 230A does not require a formal, written agreement. Nor does it require implementation deadlines or template legislation to characterise legislation as uniform.

- 7.7 As found in Part 5 above, the SCAG legislative scheme under consideration in this inquiry aligns with Structure 2 - intergovernmental agreements/schemes which require adoption of "essentially identical" legislation. It also has similarities with Structure 7 - *Unilateralism*, although in this case there are model provisions.

- 7.8 Further, the Bill is supported by at least one other formal, written intergovernmental agreement - the Intergovernmental Agreement on Terrorism and Multi-Jurisdictional Crime. (See paragraphs 5.12, 5.13, 5.36 and 5.37 above.)

Structures of uniform legislation and schemes

- 7.9 The Committee's reports almost invariably contain a paragraph in terms similar to the following:

National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth, can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and

⁸⁰ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 12, *Criminal Code Amendment Bill 2003*, 2 December 2003, pp1-2.

⁸¹ Ms N Marsic, Executive Officer of the Standing Committee of the Attorneys-General confirmed that SCAG "approval" of MCCOC/MCLOC reports for release constitutes adoption of the provisions recommended in the relevant report as part of SCAG's Model Criminal Code. (Letter from Ms Natalie Marsic, Executive Officer of the Standing Committee of the Attorneys-General, 12 February 2010, p1.)

⁸² Ibid, p3.

adaptability, have been identified. The legislative structures are summarised in Appendix

- 7.10 The standard document listing the identified structures of uniform legislation is **Appendix 6** to this report. That document contains what it describes as a “*brief description*” of the structures identified by the Legislative Assembly’s Standing Committee on Uniform Legislation and Intergovernmental Agreements.
- 7.11 Appendix 6 is a useful summary, not an exhaustive list.
- 7.12 In fact, the bills the subject of the Committee’s recent Report No. 40 - *Cross-border Justice Amendment Bill 2009* and Report No. 42 - *Professional Standards Amendment Bill 2009* did not fit squarely within the structures listed in Appendix 6 but were identified by the Executive (correctly in the Committee’s opinion) as legislation to which Standing Order 230A applied.
- 7.13 The Committee draws to the attention of the House and the government the following passages in Report No. 19 - *Uniform Legislation and Supporting Documents* of the Standing Committee on Uniform Legislation and General Purposes:

The Committee observes that intergovernmental agreements can take many forms ranging from formal contracts between governments through to the most informal mechanisms. In its Eleventh Report the Committee noted that uniform legislation is often underpinned by a detailed intergovernmental agreement particularly where the legislative scheme requires a high degree of uniformity and consistency.

...

However the Committee observes that in several cases where uniform legislation has stood referred, the Committee has not been provided with a copy of an intergovernmental agreement/memorandum of understanding as it was informed that one did not exist.⁸³

⁸³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 19, *Uniform Legislation and Supporting Documents*, August 2004, pp13-4. The footnote to this last paragraph states: “*The fact that there was no formal intergovernmental agreement/memorandum of understanding in respect of certain bills standing referred to the Committee was noted in: Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, Report No. 11: Higher Education Bill 2003, September 2003, pp7-10; Report No. 12: Criminal Code Amendment Bill 2003, December 2003, pp1-2; Report No. 15: Australian Crime Commission (Western Australia) Bill 2003, June 2004, pp4-5; and Report No. 18: Workers’ Compensation and Rehabilitation Amendment (Cross Border) Bill 2004, August 2004, pp4-9*”.

- 7.14 In its Report No. 23 - *The Work of the Committee during the Second Session of the Thirty-Sixth Parliament – August 13 2002 to November 16 2004*, the Standing Committee on Uniform Legislation and General Purposes said:

*The Committee emphasises that the term ‘uniform legislation’ does not mean that the legislation is identical in nature. As noted in the Committee’s Nineteenth Report, some collaborative arrangements may not necessarily involve identical or even common legislative elements at all. Indeed it has been suggested that the phrase “harmonisation in law” is also an appropriate description for uniform legislation.*⁸⁴

Matter drawn to attention of the House and the Executive

- 7.15 The Committee (and earlier uniform legislation scrutiny committees) has previously reported on the difficulty with the identification of bills subject to standing order 230A and expressed the desire that the Executive adopt practices mindful of the process of referral under that standing order.⁸⁵
- 7.16 The Executive’s failure to identify legislation as uniform impedes the Committee’s scrutiny of legislation within the limited timeframe available to it by requiring its resources to be devoted to establishing whether legislation is in fact uniform, rather than the provisions of a bill itself.⁸⁶
- 7.17 In its Report No. 19 - *Uniform Legislation and Supporting Documents*, the Standing Committee on Uniform Legislation and General Purposes drew the House’s attention to the issues arising from the Executive’s failure to provide supporting documents. In particular, it noted:

Although COAG maintains a website, which provides extracts of more recent COAG meetings, copies of COAG communiques and

⁸⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 23, *The Work of the Committee during the Second Session of the Thirty-Sixth Parliament – August 13 2002 to November 16 2004*, 18 November 2004, pp9-10.

⁸⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, August 2004. See also: Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 12, *Criminal Code Amendment Bill 2003*, 2 December 2003, p4 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No. 2, The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, 21 August 2002, p12.

⁸⁶ In its Report No. 19, the Standing Committee on Uniform Legislation and General Purposes drew the House’s attention to the problems caused by the Executive’s failure to identify a bill as uniform. See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 19, *Uniform Legislation and Supporting Documents*, August 2004, p2.

*intergovernmental agreements, the minutes of its Ministerial Councils are not as easily accessible.*⁸⁷

- 7.18 While in general there has been an improvement in the situation since the tabling of that report, the Committee considers, in light of the problem recurring in its recent inquiries, that it is timely to again draw that report to the attention of the Executive.
- 7.19 Given the report of the previous Committee in respect of the application of Standing Order 230A(1)(a) to bills implementing Model Criminal Code provisions endorsed by SCAG, and the existence of the additional formal, written intergovernmental agreements noted above establishing a national scheme in respect of the subject matter of identity crime (Standing Orders 230A(1)(a) and (b)), the Executive's failure to identify the Bill as uniform and the Attorney General's statements in providing the 2008 Identity Crime Report, are particularly puzzling.
- 7.20 The assertions of the Attorney General required the Committee to review the status of the SCAG Model Criminal Code and restate in Part 5 of this report the previous advice of this and predecessor Committees as to the various structures for uniform legislation.
- 7.21 The Committee draws this matter to the attention of the Legislative Council.

8 BEHAVIOURS CAPTURED/NOT CAPTURED BY THE CRIMINAL CODE AMENDMENT (IDENTITY CRIME) BILL 2009

Wide range of behaviours captured

- 8.1 As previously noted, the House has been advised that this Bill targets fraud.
- 8.2 The Second Reading Speech, however, acknowledged that preparatory behaviour in respect of a far wider range of offences is in fact captured by the provisions proposed by the Bill. In illustrating the operation of the penalty provisions, Hon Michael Mischin MLC gave the example of identification material being used in the commission of murder has attracted a more serious penalty than where it is used illicitly to pay a hotel bill.⁸⁸
- 8.3 The materials set out in Part 4 of this Report illustrate the range of behaviours captured by the offences proposed by the Bill.

⁸⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No. 19, *Uniform Legislation and Supporting Documents*, August 2004, p10.

⁸⁸ Hon Michael Mischin MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9412.

Trade and professional qualifications

- 8.4 The submission from the Department of Commerce raised the fact that from time to time it was presented with forged or falsified identification documents to obtain an occupational licence, such as an electrician's licence. It was also aware of false documents, including licences, being used to obtain employment.
- 8.5 The Department of Commerce suggested an amendment of the definition of "identification information" in proposed section 489 to include: "*information about a person's trade or professional status*".
- 8.6 The Attorney General advised that the Committee that his present view was that the issue of forged or falsified documents to obtain or renew an occupational licence was dealt under existing provisions of *The Criminal Code*, including sections 473 (forging and uttering) and section 488 (procuring or claiming an unauthorised status) of *The Criminal Code*.⁸⁹
- 8.7 Section 473 of *The Criminal Code* provides that a person who forges or utters a record with intent to defraud is guilty of an offence and section 488 that using a false representation to obtain a certificate testifying that the holder is entitled to any right or privilege, and making a false representation as to holding such a certificate, are offences.
- 8.8 The Attorney General is also of the view that using forged or falsified documents to obtain an occupational licence:

*is not an example of using or assuming another's identity but rather illegitimately claiming a certain status in relation to oneself.*⁹⁰

Interstate and international application of the Bill

- 8.9 As the materials set out in Part 4 of this Report confirm, identity crime is often a multi-jurisdictional or international operation.
- 8.10 Section 12 of *The Criminal Code* provides:

(1) An offence under this Code or any other law of Western Australia is committed if—

(a) all elements necessary to constitute the offence exist;

and

⁸⁹ Letter from Hon Christian Porter MLA, Attorney General, 15 February 2010, p1.

⁹⁰ Ibid, p1.

(b) at least one of the acts, omissions, events, circumstances or states of affairs that make up those elements occurs in Western Australia.

(2) Without limiting the general operation of subsection (1), that subsection applies even if the only thing that occurs in Western Australia is an event, circumstance or state of affairs caused by an act or omission that occurs outside Western Australia.

(3) This section does not apply to an offence if—

(a) the law under which the offence is created explicitly or by necessary implication makes the place of commission an element of the offence; or

(b) the law under which the offence is created is a law of extraterritorial operation and explicitly or by necessary implication excludes the need for a territorial nexus between Western Australia and an element of the offence.⁹¹

8.11 At the hearing, the Department of the Attorney General advised that this provision has the effect that in the event a person makes, supplies or possesses identification information in Western Australia with the intent of committing (or facilitating the committal of) an offence in another Australian jurisdiction, the person is liable to prosecution under legislation in the other jurisdiction but not the offences proposed by the Bill: in the event a person makes, supplies or possesses identification information in another Australian jurisdiction with the intent of committing (or facilitating the committal of) an offence in Western Australia, the person is liable to prosecution under the offences proposed by the Bill.⁹²

8.12 The situation in respect of a person who makes, supplies or possesses identification information in Western Australia with the intent of committing (or facilitating the committal of) an offence in another country or who makes, supplies or possesses

⁹¹ Section 14 of *The Criminal Code* also provides: “Any person who, while in Western Australia, procures another to do an act or make an omission at a place not in Western Australia of such a nature that, if he had himself done the act or made the omission in Western Australia, he would have been guilty of an offence, and that, if he had himself done the act or made the omission, he would have been guilty of an offence under the laws in force in the place where the act or omission is done or made, is guilty of an offence of the same kind, and is liable to the same punishment, as if the act had been done or the omission had been made in Western Australia, but so that the punishment does not exceed that which he would have incurred under the laws in force in the place where the act was done or the omission was made, if he had himself done the act or made the omission”.

⁹² Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, and Mr Luke Hoare, Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, pp5-6 and 9.

identification information in another country with the intent of committing (or facilitating the committal of) an offence in Western Australia, is however unclear.⁹³

Recommendation 1: The Committee recommends that the responsible Minister advise the Legislative Council whether the offences proposed by the Bill will apply in the event a person:

- **makes, supplies or possesses identification information in Western Australia with the intent of committing (or facilitating the committal of) an offence in another country; or**
- **makes, supplies or possesses identification information in another country with the intent of committing (or facilitating the committal of) an offence in Western Australia.**

Impact on persons under 18

8.13 The submission of the Law Society of Western Australia (**LSWA**) referred to a special provision in the *Criminal Law Consolidation Act 1935 (SA)* exempting persons under the age of 18 who use false documents to buy cigarettes, alcohol or to enter restricted premises.⁹⁴

8.14 LSWA noted that as the offences proposed by the Bill related to intended committal of indictable offences, they would only apply in the event a juvenile was buying cigarettes, alcohol or entering the restricted premises in order to commit the related indictable offence. LSWA provided an example of such a scenario, being a juvenile entering a nightclub with false proof of age to commit grievous bodily harm.

8.15 While acknowledging that such situations were possible, rather than probable, LSWA suggested an amendment to the Bill in terms similar to the South Australian provision (which is at footnote 94).

8.16 The Committee reports this suggestion for the information of the Legislative Council.

⁹³ Ibid, p9.

⁹⁴ The South Australian legislation contains a provision excepting certain behaviours by persons under 18: “*This Part does not apply — (a) to misrepresentation by a person under the age of 18 years for the purpose of — (i) obtaining alcohol, tobacco or any other product not lawfully available to persons under the age of 18; or (ii) gaining entry to premises to which access is not ordinarily allowed to persons under the age of 18; or (b) to any thing done by a person under that age to facilitate such a misrepresentation.*” Section 144F of the *Criminal Law Consolidation Act 1935 (SA)*.

Not an offence to impersonate another *per se*

- 8.17 As drafted, the proposed offences will not apply to situations where an identity is assumed or stolen otherwise than with the intent to commit, or facilitate the committal of, a crime. On this, the 2008 Identity Crime Report stated:

*The Committee considered having the offence also apply to the impersonation of another person, but decided that this did not fit within the scope of this Paper or draft offence provision.*⁹⁵

Act of credit card skimming

- 8.18 Proposed sections 490-492, which have ‘rolled up’ the SCAG Model Criminal Code provisions in respect of credit card skimming with its provisions in respect of identity crime, do not criminalise the act of credit card skimming.
- 8.19 However, the proposed section 492 offence of possessing identification equipment (being, amongst other things, anything capable of retaining identification information) for the purpose of committing (or facilitating the committal of) an indictable offence is broad enough to capture a person being in possession of that equipment during the act of credit card skimming.⁹⁶

9 PREPARATORY OFFENCES AND GENERAL PRINCIPLES OF CRIMINAL LAW
Introduction

- 9.1 It has been noted above that the offences proposed by sections 490 to 492 require no act beyond that which is merely preparatory to give effect to the intention to commit (or facilitate the committal of) an indictable offence.
- 9.2 To clarify, the offences are considered “*preparatory*” because the acts of possessing, making, or supplying identification material will not be offences under the new sections proposed by the Bill. The offences created are the doing of these things in preparation for (or to facilitate) the intended commission of an indictable offence.
- 9.3 As a general principle, the criminal law does not punish intent unaccompanied by action or omission, beyond that which is merely preparatory, giving effect to that intent:

⁹⁵ Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on Identity Crime*, March 2008, p31.

⁹⁶ In evidence, Mr Marshall pointed out that: it is possible for someone lawfully to possess an RFD, which is a radiofrequency device: “*It is basically a skimming device, or devices similar to it. Obviously if they are repairing the machines or working on the machines, they are a category of people who can lawfully possess*”. (Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p2.)

*So long as a crime lies merely in the mind it is not punishable, because criminal thoughts often occur to people without any serious intention of putting them into execution;*⁹⁷

And:

*The criminal law only punishes those who have committed acts which have the potential for harm, such as an incitement or attempt to commit an offence, and not a mere suspicion that a person is about to commit an offence.*⁹⁸

- 9.4 In its 1992 Report on Police Act Offences, the Law Reform Commission of Western Australia said:

*The criminal law should not apply to persons who are suspected of being about to commit an offence unless there has been an incitement or an attempt.*⁹⁹

It recommended the deletion or amendment of various police act offences on the ground that they offended this principle.¹⁰⁰

- 9.5 When considering the general criminal principles that should apply in the SCAG Model Criminal Code, the MCCOC said, in discussing the issues surrounding the degree of “*preparation*” that constituted an attempt offence:

*The Committee considered and debated the “substantial step” test advocated by, for example, the US Model Penal Code and Professor Glanville Williams, “Wrong Turnings on the Law of Attempt” [1991] Crim LR 416. This test could include acts of preparation and was rejected as too broad. The Committee believes that some step towards the perpetration of the offence is essential.*¹⁰¹

⁹⁷ Williams G, *Textbook of Criminal Law* (2nd ed 1983) 402 quoted in Law Reform Commission of Western Australia, Report No. 85, *Police Act Offences*, August 1992, p16, footnote 31.

⁹⁸ Law Reform Commission of Western Australia, Report No. 85, *Police Act Offences*, August 1992, pp15-6.

⁹⁹ Ibid p35.

¹⁰⁰ For example, it recommended the amendment of the loitering charge to a provision allowing the issue of a move on notice in circumstances where there was suspicion that a person might be about to commit an offence and no reasonable explanation was provided for the person’s presence in the area on the basis that: “*It does not expand the scope of the criminal law to include behaviour which falls short of an attempt. The offence would be contravening a direction to leave the vicinity in the absence of a reasonable explanation for the person's presence there*”. Law Reform Commission of Western Australia, Report No. 85, *Police Act Offences*, August 1992, pp38-9.

¹⁰¹ Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on General Principles of Criminal Responsibility*, December 1992, p77.

- 9.6 However, in the 2006 Credit Card Skimming Report the recommendation of preparatory offences in respect of credit card skimming was explained as follows:

But skimming of credit card data is unlikely to constitute attempted forgery or fraud as the act of skimming credit card data is unlikely to be more than preparatory to the commission of fraud or forgery. It is also doubtful whether many skimmers would have intention with regard to each physical element of the principal offence, especially in cases where an organised group pays employees of service stations or other high-risk industries to skim cards and the group then commits the fraud or forgery. While the employee who skimmed the credit cards may be reckless regarding the use of the data, recklessness is not sufficient in cases of attempt. Where the principal offence is to be committed overseas, and would not be an offence against any Australian law, this poses further problems for prosecuting attempts in Australia.¹⁰²

- 9.7 This explanation appears pertinent to identity crime offences generally.
- 9.8 The Attorney General's explanation for the Bill introducing preparatory offences is set out in paragraphs 4.35 and 4.36 above.¹⁰³
- 9.9 There is precedent in *The Criminal Code* for preparatory offences of the type proposed by the Bill. Chapter LVIIA to Part VII of *The Criminal Code* is entitled - *Offences to do with preparing to commit offences* - and includes, for example, section 557E which provides:

A person who is in possession of a thing with the intention of using it to facilitate the unlawful entry of any place is guilty of an offence and is liable to imprisonment for 12 months and a fine of \$12 000.

- 9.10 More relevant to the subject matter of the offences proposed by the Bill, section 474 of *The Criminal Code* provides the offence of preparation for forgery:

(1) Any person who makes, adapts or knowingly has possession of any thing under such circumstances as to give rise to a reasonable suspicion that it has been, or is being, made, adapted or possessed for

¹⁰² Standing Committee of the Attorneys-General *Model Criminal Law Officers' Committee Final Report on Credit Card Skimming and Related Offences*, February 2006, p10.

¹⁰³ The Committee notes that the Law Book Company *Laws of Australia* cites the case of *R v Lobreau* ((1988) 67 CR(3d) 74 (CA Alta)), where making an impression of an ignition key was not sufficient to constitute attempted stealing, which also illustrates the problems experienced in prosecuting attempt offences.

a purpose that is unlawful under section 473 is guilty of a crime and is liable to imprisonment for 3 years.

Summary conviction penalty: Imprisonment for 18 months or a fine of \$18,000.¹⁰⁴

- 9.11 The Committee notes that in the provisions proposed by the Bill the onus remains on the prosecution to prove intent to commit an indictable crime, which must be established beyond reasonable doubt.
- 9.12 The Committee is of the view that proposed sections 490-2 are akin to the existing exceptions to the general principle that the criminal law should not apply to persons who are suspected of being about to commit an offence unless there has been an incitement or an attempt.

Finding 5: The Committee finds that proposed sections 490-2 are akin to the existing exceptions to the general principle that the criminal law should not apply to persons who are suspected of being about to commit an offence unless there has been an incitement or an attempt.

Penalty does not reflect degree of criminality

- 9.13 As noted above, the penalty for an offence under section 490 is the greater of seven years imprisonment or the penalty that would apply if the person were convicted of attempting the indictable offence. The penalty under sections 491 and 492 is five years imprisonment or 24 months on summary conviction.
- 9.14 However, the penalty for many indictable offences is less than seven, or even five, years imprisonment. For example, *The Criminal Code* provides the following penalties:
- section 389 - fraudulent disposition of mortgaged goods - three years imprisonment;
 - section 318 - summary conviction for serious assault - three years imprisonment and fine of \$36,000; and
 - section 87 - impersonating a public officer - two years imprisonment.

¹⁰⁴ Section 473 provides: “(1) Any person who with intent to defraud — (a) forges a record; or (b) utters a forged record, is guilty of a crime and is liable to imprisonment for 7 years. Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000”.

- 9.15 The offence of fraud - at which these proposed offences are said to be primarily targeted - carries a maximum penalty of seven years imprisonment (unless the person deceived is over 60 years of age, in which case the maximum is 10 years).¹⁰⁵
- 9.16 The penalty imposed for an offence should reflect the degree of criminality of the offence as well as the potential for harm. (See the comments in the 2008 Identity Crime Report on the penalties imposed by the equivalent Model Criminal Code provisions - paragraph 9.28 below.)
- 9.17 Consistent with the lesser degree of criminality involved in an attempt offence, under *The Criminal Code* a person convicted of attempting to commit an indictable offence is liable to the following punishment:

A person guilty of a crime under subsection (1) is liable —

(a) if the principal offence is punishable on indictment with imprisonment for life — to imprisonment for 14 years;

(b) in any other case — to half of the penalty with which the principal offence is punishable on indictment.

Summary conviction penalty: for an offence where the principal offence may be dealt with summarily, the lesser of —

(a) the penalty with which the principal offence is punishable on summary conviction; or

(b) the penalty that is half of the penalty with which the principal offence is punishable on indictment.¹⁰⁶

- 9.18 Also consistent with the lesser degree of criminality, the penalty on conviction of a conspiracy offence is:

(2) A person guilty of a crime under subsection (1) is liable —

(a) if the principal offence is punishable on indictment with imprisonment for life — to imprisonment for 14 years;

(b) in any other case — to half of the penalty with which the principal offence is punishable on indictment.

¹⁰⁵ Section 409 of *The Criminal Code*.

¹⁰⁶ Section 552 of *The Criminal Code*.

*Summary conviction penalty: for an offence where the principal offence may be dealt with summarily — the penalty with which the principal offence is punishable on summary conviction.*¹⁰⁷

- 9.19 For the offence of representing oneself as another with intent to defraud, section 510 of *The Criminal Code* provides a penalty of three years (unless the representation is that the offender is a person entitled by will or operation of law to any specific property and the offence is committed with intent to obtain such property, in which case the maximum penalty is 14 years).¹⁰⁸
- 9.20 The penalty for the offence of preparation for forgery is three years imprisonment if convicted on indictment and 18 months if convicted summarily; whereas the penalty for forgery is seven years imprisonment.
- 9.21 Mr Marshall explained the relationship between the proposed offences, offence of attempt and offence of conspiracy as follows:

I think the major difference is that these [proposed] offences do not require two or more people, which of course conspiracy requires.

...

If, for example, I intended to commit a serious offence — I do not know what you want to make it, murder or robbery — and I persuaded, let us say, Luke, to give me his identity so I could use his identity to commission (sic) that offence; let us say they have taped my conversation. I could be charged with conspiracy because I am asking him to be involved in the commission of an indictable offence. I note there is another question later on that talks about “attempted”. I could also be charged with attempting to commit the indictable offence, although I suspect the prosecution would require a little bit more than just my conversation with Luke. Of course I could well be, if I am in possession of his identity, charged under one of these offences in this bill.

...

The Chairman: *That being the case, could you be charged with possession with intent to conspire?*

¹⁰⁷ Section 558 of *The Criminal Code*.

Mr Marshall: I am not absolutely sure on that one. Possession with intent to conspire — I presume you could, in the sense that I am in possession of an identity that is not mine and I have made it clear to somebody that I intend to commit an offence, which is conspiracy.

...

If I go beyond just talking to Luke about intending to commit an offence, maybe having done a surveillance of the property or something, then I could get charged with attempt.¹⁰⁹

- 9.22 This evidence confirms that there is an escalating degree of criminality, with the offences proposed by the Bill requiring the least degree of action towards the commission of the intended indictable crime.
- 9.23 A person convicted under proposed section 490, 491 or 492 may be exposed to risk of a higher maximum penalty than if the person had been convicted of actually committing the intended offence or of putting the intent into effect by attempting the offence or conspiring to commit the offence.
- 9.24 There is a lack of parity between the maximum penalty applying to an offence under proposed sections 490, 491 and 492 and the existing penalties for offences involving a greater degree of criminal behaviour under *The Criminal Code*.

Finding 6: The Committee finds that there is a lack of parity between the maximum penalty applying to an offence under the Bill’s proposed sections 490, 491 and 492 and the penalties for existing offences involving a greater degree of criminal behaviour under *The Criminal Code*.

Lack of parity with other jurisdictions

- 9.25 In the Second Reading Speech to the Bill, Hon Michael Mischin MLC said:

Importantly, the Bill will impose some of the most rigorous penalties in Australia for the commission of these offences. This reflects the Government’s appraisal of the seriousness of this type of offence.¹¹⁰

¹⁰⁸ Section 510 of *The Criminal Code* provides: “Any person who, with intent to defraud any person, falsely represents himself to be some other person living or dead, is guilty of an offence which unless otherwise stated, is a crime; and he is liable to imprisonment for 3 years. If the representation is that the offender is a person entitled by will or operation of law to any specific property, and he commits the offence with intent to obtain such property, or possession thereof, he is guilty of a crime, and is liable to imprisonment for 14 years”.

¹⁰⁹ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, pp2-3.

9.26 However, the nature of identity crime offences is such that different persons in different states may act in concert with a view to committing, or facilitating the committal of, an indictable offence. In that circumstance it appears inequitable that the penalty to which a person may be subject is dependant, not on the criminality of the behaviour, but on location.

9.27 The SCAG Model Criminal Code provides for maximum penalties of:

- for “*dealing*” (that is making, supplying or using) in identity information - five years; and
- for possession of identity information or equipment for making identity material - three years.¹¹¹

9.28 In explaining the maximum penalties, the 2008 Identity Crime Report said:

The offence of going equipped for theft, robbery, burglary or other offences is a preparatory offence and for that reason carries a maximum penalty of only three years imprisonment.

...

The majority of submissions supported the increase of the penalty to more than three years imprisonment as a maximum penalty.

...

However, as Victoria Legal Aid pointed out, the offence is preparatory in nature and for that reason should not attract high penalties. Nevertheless, the preparatory nature of the offence needs to be balanced with the seriousness of the offence and the impact that it has on society.

The Committee considered having a tiered penalty system with a maximum penalty of five years imprisonment for a person who intended to commit an indictable offence, and a penalty of 12 months imprisonment for a person who intended to commit a less serious offence. However, the Committee decided that the courts should have the discretion in sentencing a person to take into account the seriousness of the offence to which the identity crime was directed.

¹¹⁰ Hon Michael Mischin MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9411.

¹¹¹ Standing Committee of the Attorneys-General *Model Criminal Law Officers’ Committee Final Report on Identity Crime*, March 2008, p26.

*Accordingly, the Committee recommends maximum penalty of five years imprisonment.*¹¹²

- 9.29 For the offence of making use of another person's personal identification information with intent to commit, or facilitate the commission of, an indictable offence, South Australia imposes a penalty equivalent to that applying to attempt.¹¹³ The penalty for production, selling and being in possession of equipment for making material enabling a person to assume a false identity for the purpose of committing, or enabling the commission of, an offence is three years imprisonment.¹¹⁴
- 9.30 In Queensland a person who obtains or deals with another entity's identification information for the purpose of committing, or facilitating the commission of, an indictable offence commits a misdemeanour only and is liable to a maximum of three years imprisonment.¹¹⁵
- 9.31 Victoria provides a maximum of five years imprisonment for making, using or supplying identity information and three years for possession of identity information or equipment.¹¹⁶
- 9.32 New South Wales imposes higher maximum penalties than the Bill for dealing with identification information - 10 years imprisonment - and possession of identification material - seven years imprisonment; whereas possession of identification equipment carries a lesser penalty of three years imprisonment.¹¹⁷ (This legislation was assented to in December 2009, after introduction of the Bill to the Legislative Council.)

Explanation for penalties

- 9.33 In the Second Reading Speech to the Bill, Hon Michael Mischin MLC provided the following explanation for the penalty provisions of section 490:

The Government believes that offences of this nature, which go to the heart of what identity means to an individual on both a legal and a personal nature, when combined with an understanding of their economic significance and the fact that these offences will be associated with other indictable offences, a penalty of seven years imprisonment is appropriate. However, in instances where

¹¹² Ibid, p35.

¹¹³ Section 144C(1) of the *Criminal Law Consolidation Act 1935(SA)*.

¹¹⁴ Section 144D of the *Criminal Law Consolidation Act 1935(SA)*.

¹¹⁵ Section 408D of *The Criminal Code (Qld)*.

¹¹⁶ Sections 192B to 192D of the *Crimes Act 1958 (Vic)*.

¹¹⁷ *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009 (NSW)*.

*identification material is used to attempt to commit an indictable offence where the penalty attempt to commit that offence is greater than seven years imprisonment, then the higher penalty will apply.*¹¹⁸

9.34 The explanation provided in the Second Reading Speech to the Bill does not explain why the penalty should be higher for the section 490 preparatory offence than the offence of actually committing the indictable crime or the offence of attempting to commit the indictable offence.

9.35 At the hearing, Mr Hoare and Mr Marshall advised:

Mr Hoare: The penalties were arrived at after perhaps a reappraisal of some different implications of identity crime. As the minister made reference to [in] his second reading speech, that included its economic impact and the fact that they are often related to other indictable offences.

*Mr Marshall: I think as we sort of touched on before, it goes to the heart of who you are in the sense of your identity.*¹¹⁹

9.36 With respect to the explanation that the nature of the proposed offences justifies the higher penalties, the Committee notes that the Bill does not create an offence of identity theft *per se*. It creates offences related to using another's identity for the purpose of committing a second, indictable offence. It is the intent to commit, or facilitate the committal of that indictable offence, that constitutes the criminality - not the making, using or supplying of identification material.

9.37 Further, the imposition of a higher penalty for the reason of theft of another's identity is not consistent with the Personation offences of Chapter LIII, Part VI of *The Criminal Code*, which impose a variety of penalties for various offences of actual personation based on the seriousness of the purpose of the personation, not a single penalty for the act of personation itself.

9.38 The disparity between degree of criminality and penalty may encourage prosecution agencies to prefer charges under less appropriate offences because they carry a higher prospect of conviction and/or maximum penalty. (For example, bringing a charge of possession of identification material under proposed section 491, instead of commission of the second, indictable offence that may in fact have been committed.)

¹¹⁸ Hon Michael Mischin MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9412.

¹¹⁹ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, and Mr Luke Hoare, Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p8.

Conclusion

- 9.39 The Attorney General has made it plain that the purpose of the Bill is to fill a gap in the law that frustrates prosecutions for attempt offences by requiring a preparatory act. In effect, the Bill removes the need to establish the taking of a preparatory act, or existence of a conspiracy, where a person makes, uses, supplies or possesses identification material or possesses identification equipment. It is lowering the threshold of criminality and, therefore, conviction.
- 9.40 Parity and consistency in penalties is important. It is undesirable that proposed sections 490, 491 and 492 will in many circumstances carry a greater penalty than the attempt and conspiracy offences or even commission of the intended indictable offence.

Finding 7: The Committee finds that it is undesirable that sections 490, 491 and 492 proposed by the Bill will in many circumstances carry a greater penalty than the related attempt and conspiracy offences or even commission of the intended indictable offence.

- 9.41 In the circumstance that a series of behaviours by different people in different jurisdictions may cumulatively lead to the committal of the intended indictable offence, the Committee draws the attention of the Legislative Council to the fact that the penalty to which a person may be exposed will depend on location, not criminality, of the particular offence with which the person is charged.
- 9.42 The SCAG Model Criminal Code, and other jurisdictions that have enacted identity crime legislation (other than New South Wales), have recognised the preparatory nature of the offences in the penalty imposed. While the SCAG Model Criminal Code intergovernmental agreement does not require uniformity, the interstate (and, indeed, international) nature of many of these offences requires in the Committee's view, a better explanation of the reason for Western Australia not adopting a more consistent approach to penalty.

Recommendation 2: The Committee recommends that the responsible Minister provide the Legislative Council with an explanation as to why the maximum penalties imposed by proposed sections 490 to 492 are not limited so as not to exceed the penalty that might be imposed for attempting the intended indictable offence to which the relevant offences relate.

Recommendation 3: The Committee recommends that the responsible Minister provide the Legislative Council with an explanation as to why the maximum penalties imposed by proposed sections 490 to 492 are higher than those recommended by the SCAG Model Criminal Code and, with the exception of New South Wales, higher than those imposed by the other Australian jurisdictions.

Possibility of multiple charges and convictions

9.43 As has been observed, the new offences proposed by the Bill overlap with the existing attempt and conspiracy offences of *The Criminal Code*.

9.44 The distinguishing feature in respect of an attempt offence is that: for an attempt offence to occur, a person must engage in conduct beyond that which is merely preparatory to give effect to the commission of an indictable offence;¹²⁰ whereas proposed section 490, 491 and 492 require no act giving effect to intent to have occurred.

9.45 By section 558 of *The Criminal Code*:

(1) Any person who conspires with another person —

(a) to commit an indictable offence (the **principal offence**); or

(b) to do any act or make any omission in any part of the world which, if done or made in Western Australia, would be an indictable offence (the **principal offence**) and which is an offence under the laws in force in the place where it is proposed to be done or made,

is guilty of a crime.

(3) Without limiting subsection (1), the application of subsection (1) extends to a conspiracy under which an offence is to be committed, or an act or omission done or made, by a person other than the persons conspiring with each other.

(Original emphasis)

¹²⁰ Section 4 of *The Criminal Code* provides: “When a person, intending to commit an offence, begins to put his intention into execution by doing an act that is more than merely preparatory to the commission of the offence but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt to commit the offence. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances”.

9.46 As previously observed, Mr Marshall explained the major difference between the offences proposed by the Bill and conspiracy as being:

*I think the major difference is that these offences do not require two or more people, which of course conspiracy requires.*¹²¹

9.47 Unlike the situation in respect of attempt offences, the conspiracy offences apply to sections 490, 491 and 492. That is, a person may be charged with an offence of possessing identification material for the purpose of conspiring to commit an indictable offence. Similarly, a person can be charged with both an offence under the provisions proposed by the Bill and the offence of conspiring to gain possession of identity information for the purpose of committing an indictable offence.

9.48 At common law, the plea of *autrefois acquit* is available to an accused person who has previously been tried and acquitted of the same offence; the plea of *autrefois convict* is available to a person who has previously been tried and convicted of the same offence.

9.49 In the text, *An Introduction to Criminal Law in Queensland and Western Australia*, R G Kenny, Senior Lecturer in Law, University of Queensland, notes that these pleas are a manifestation of the principle that a person may not be twice vexed for the same cause and says:

*These principles are of the greatest importance in both civil and criminal matters in that, once a cause has been judicially determined in a final matter between the parties having jurisdiction to make the determination, neither of the parties may assert the contrary in subsequent proceedings between them. In their application to the criminal law, the principles are known as the rules against double jeopardy, an expression which is not always used with a single meaning and can be employed in relation to the prosecution, conviction and punishment stages of the criminal justice process.*¹²²

9.50 The pleas of *autrefois acquit* and *autrefois convict* are retained in *The Criminal Code* by section 17, which provides:

It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment or prosecution notice on which he might have been convicted of the offence with which he is charged, or has already been

¹²¹ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p2.

¹²² Kenny, R G, *An Introduction to Criminal Law in Queensland and Western Australia* (7th edition), LexiNexis Butterworths, Australia, 2008, p102.

convicted or acquitted of an offence of which he might be convicted upon the indictment or prosecution notice on which he is charged.

9.51 Section 17 of *The Criminal Code* also provides a defence to the charge of some new offence, different from the previous charge but on which charge the accused could have been convicted as an alternative to the charge on the original indictment.

9.52 However, section 10A of *The Criminal Code*, which provides:

(1) A person charged with an offence cannot be convicted by the court dealing with the charge of any other offence instead of that offence unless —

(a) the accused is charged with the other offence as an alternative to that offence; or

(b) this Chapter provides otherwise,

has the effect that for the defence provided by section 17 of *The Criminal Code* to be available to an accused charged under the provisions proposed by the Bill, and for the prosecution to have available the possibility of conviction of an offence proposed by the Bill as an alternative to conviction of an offence with a greater degree of criminality, the offences proposed by the Bill must be designated as alternative offences.

9.53 Section 10D of *The Criminal Code* specifies some offences as generic alternative offences:

*If a person is charged with committing an offence (the **principal offence**), the person, instead of being convicted as charged, may be convicted of —*

(a) attempting to commit;

(b) inciting another person to commit; or

(c) becoming an accessory after the fact to, the principal offence or any alternative offence of which a person might be convicted instead of the principal offence.

9.54 Section 10E provides the reverse:

*If a person is charged with attempting to commit an offence (the **principal offence**) other than an offence under section 283, the person, instead of being convicted as charged, may be convicted of —*

(a) committing the principal offence; or

(b) committing, or attempting to commit, any alternative offence of which any person charged with the principal offence might be convicted instead of the principal offence,

but the person shall not be liable to a punishment greater than the greatest punishment to which the person would have been liable if convicted of attempting to commit the principal offence.

(Committee's emphasis)

- 9.55 Section 10F is in equivalent terms to section 10E in respect of the offence of conspiracy.
- 9.56 Various sections of *The Criminal Code* specify particular alternative offences of which a person may be convicted if charged with the principal offence provided for in that section.¹²³
- 9.57 The evidence of Mr Marshall at the hearing suggested that the provisions proposed by the Bill relate to the “*principal offence*” (that is, the intended indictable offence) in the same way as the attempt and conspiracy offences found in *The Criminal Code*. He advised, however, that the offences proposed by the Bill are not alternative offences to the indictable offences that it is intended to commit or to attempt or conspiracy offences in respect of that indictable offence.¹²⁴

Recommendation 4: The Committee recommends that the responsible Minister provide an explanation to the Legislative Council as to why:

- **section 10D of *The Criminal Code* has not been amended to include a reference to the preparatory offences proposed by clause 5 of the Bill; and**
- **it is not proposed to insert provisions equivalent to sections 10E and 10F of *The Criminal Code* in respect of the preparatory offences proposed by clause 5 of the Bill.**

¹²³ For example, section 232 of *The Criminal Code* provides: “Any person who, by means of violence of any kind and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance, is guilty of a crime, and is liable to imprisonment for 20 years. Alternative offence: s. 301 or 317A”.

¹²⁴ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p3.

10 CERTIFICATES

10.1 Proposed section 494(2) provides that on conviction of a person of an identity offence, the court may issue a certificate to a victim of an identity offence setting out:

- (a) *the identity offence to which the certificate relates; and*
- (b) *the name of the victim; and*
- (c) *any matter prescribed by regulations made under subsection (6); and*
- (d) *any other matter the court considers relevant.*

10.2 Hon Michael Mischin MLC stated in the Second Reading Speech to the Bill:

*Apart from its economic impact, identity crime leaves behind victims who can be deeply affected by the misuse of their identity. Consequently, the Bill empowers courts to issue certificates to individuals whose identity has been illegally used for the commission of an offence to assist with any subsequent problems they may experience in either a personal or business capacity as a result of these crimes.*¹²⁵

10.3 The submissions received by the Committee supported the principle of legislative power to issue certificates to victims of identity crime.

10.4 However, there were some questions with the provision proposed by the Bill, which questions are discussed below.

Issues

Reliance on certificates

10.5 Proposed section 494(5) will, if enacted, provide:

A certificate issued under this section is, in the absence of evidence to the contrary, evidence of its contents.

10.6 The Australian Bankers' Association Inc. had a number of questions relating to the practical effect of the certificates and the general scheme that would surround their issue. It queried:

¹²⁵ Hon Michael Mischin MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2009, p9412.

- who would bear liability in the event a certificate was wrongly issued or forged or had some defect;
- what remedies would be available to a person who relied upon a certificate or representations contained in it;
- appropriate quality and security standards to ensure authenticity of certificates;
- a central point for verification of certificates;
- whether certificates will have expiry dates; and
- whether and under what circumstances a certificate can be cancelled.¹²⁶

10.7 In summary, the Australian Bankers' Association Inc.'s questions related to the reliance that its members would place on the certificates; a critical matter, as no legal obligation has been identified by the government that requires an institution to act on production of a certificate that a person has been a victim of an identity offence.

10.8 The Committee also had a question as to whether financial institutions or other entities located interstate or internationally were required to recognise certificates issued in Western Australia.

Delay in issue of certificates

10.9 The Office of the Deputy Commissioner noted that:

*In some instances it can take many months, if not years, to convince financial institutions and investigating authorities that an offence has been committed and that it should be investigated. Then any subsequent investigation and court case, if the offender is apprehended, can also take years.*¹²⁷

10.10 The Office of the Deputy Commissioner also pointed out that a Western Australian might be the victim of an identity crime where the perpetrator was overseas and, therefore, beyond the jurisdiction of Western Australia Police.

10.11 The Office of the Deputy Commissioner's view that conviction-based issue of certificates did not provide timely assistance to victims, or address all circumstances in which a person might be a victim of identity crime, was shared by the Australian Financial Conference.

¹²⁶ Submission No. 1 from Australian Bankers' Association Inc., 16 December 2009, pp1-2.

- 10.12 Both the Office of the Deputy Commissioner and the Australian Financial Conference noted that the MCLOC 2008 Identity Crime Report recommended issue of a certificate where no conviction had occurred, or prior to a court hearing, where a court was satisfied on the balance of probabilities that the person was the victim of an identity offence.¹²⁸
- 10.13 The Office of the Deputy Commissioner also submitted that provision should be made for issue of a certificate to persons who were the victims of an identity crime in respect of which a conviction occurred prior to the enactment of the Bill.¹²⁹

Scope of regulation-making power

- 10.14 An immediate question that arose for the Committee was the narrow scope of the proposed regulation-making power in the context of a principal Act that did not contain a general “*necessary and convenient*” regulation-making power.
- 10.15 The Committee noted that South Australia put its power to issue certificates to victims of identity crime in its *Criminal Law (Sentencing) Act 1988 (SA)*. Victoria also put its power in the *Sentencing Act 1991 (Vic)*. The Committee questioned whether the provision for issue of certificates might not more comfortably be placed in the *Sentencing Act 1995*, where there is a general regulation-making power (section 148) that is not present in *The Criminal Code*.

Government’s response

Reliance on certificates in Western Australia

- 10.16 With respect to the Australian Bankers’ Association Inc.’s concerns as to liability in the event of a forged certificate, the Department of the Attorney General referred the Committee to the *Unauthorised Documents Act 1961*.¹³⁰
- 10.17 Section 6 of the *Unauthorised Documents Act 1961* provides that it is an offence to send or deliver:

any paper or writing which is not a document published or issued out of or by or under the authority or with the sanction of any tribunal, but which in the opinion of the court before which any proceedings under this section are brought is intended or likely to convey to a person the impression that the paper or writing is a document

¹²⁷ Submission No. 5 from Office of Deputy Commissioner, Western Australia Police, 7 January 2010, p1.

¹²⁸ Submission No. 4 from Australian Finance Conference, 11 January 2010, p2 and Submission No. 5 from Office of Deputy Commissioner, Western Australia Police, 7 January 2010, p2.

¹²⁹ Submission No. 5 from Office of Deputy Commissioner, Western Australia Police, 7 January 2010, p1.

¹³⁰ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p4.

published or issued out of or by or under the authority or with the sanction of any tribunal.

10.18 The penalty for an offence under section 6 of the *Unauthorised Documents Act 1961* is a fine of \$500. The *Unauthorised Documents Act 1961* does not deal with liability or remedies in the event of reliance on a forged certificate.

10.19 After referring to the *Unauthorised Documents Act 1961*, Mr Marshall said:

*and there are a whole lot of offence provisions around that. I do not actually have the act in front of me, but that is the act.*¹³¹

10.20 The *Unauthorised Documents Act 1961* is a very short Act, consisting of eight pages and eight sections. The Committee understands Mr Marshall to have been referring to provision in other legislation, such as *The Criminal Code* provisions relating to forging and uttering noted in paragraph 8.6 above.

10.21 However, the situation of an institution, such as a financial institution or government agency, that relies on a certificate that later proves to have been false remains unclear.

10.22 The Committee does not consider that this question is an appropriate area for regulation by way of *The Criminal Code*.

10.23 However, given that the success of the remedy proposed by the Bill in section 494 will depend on confidence in the certificates, the Committee recommends that this situation be explained further.

Recommendation 5: The Committee recommends that the responsible Minister clarify for the Legislative Council:

- **the legal requirements, if any, for institutions and government agencies to act on receipt of a certificate that a person is a victim of identity crime; and**
- **the consequences of an institution or government agency relying on a false or wrongly issued certificate.**

Reliance on certificates interstate and internationally

10.24 In answer to the Committee's question as to whether a certificate issued in Western Australia would be recognised by other jurisdictions, the Attorney General noted that

¹³¹ Ibid.

the 2008 Identity Crime Report does not deal with the issue of inter-jurisdictional recognition of certificates.

- 10.25 The Attorney General advised that, as proposed section 494 was not part of a cross-jurisdictional mutual recognition arrangement, it would operate only in Western Australia. However, the Attorney General advised, courts in other jurisdictions might recognise that such certificates were relevant and admissible in evidence in other court proceedings.¹³²
- 10.26 The Attorney General further advised that interstate recognition of certificates issued in Western Australia might be achieved by the jurisdictions that enacted similar laws and granting power for courts to issue certificates based on similar criteria (currently South Australia, Queensland, New South Wales, Victoria and Western Australia) also enacting a provision indicating that certificates issued by other courts would be recognised and that such a certificate is evidence of its contents.¹³³
- 10.27 The Attorney General gave no indication as to whether such a proposal was under consideration.
- 10.28 As the Attorney General observed in his response to the Committee, it is likely that interstate financial institutions will consider the prospect of a certificate being relied upon by a court in deciding whether or not to itself rely on the certificate.

Recommendation 6: The Committee recommends that the responsible Minister advise the Legislative Council whether any steps are being taken to ensure the inter-jurisdictional recognition of certificates issued in Western Australia.

Regulations in respect of issue of certificates

- 10.29 On the questions as to the quality and security standards to ensure authenticity of the certificates, the Department of the Attorney General advised that as the certificates would be court-issued, the usual standards applicable to the issue of court documents would apply.¹³⁴
- 10.30 However, the Department of the Attorney General acknowledged at the hearing that the operational matters in respect of the issue of certificates had not been fully developed. While it was expected that there would be an expiry date for certificates, a

¹³² Letter from Hon Christian Porter MLA, Attorney General, 15 February 2010, p2.

¹³³ Ibid, p3.

¹³⁴ Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p4.

process for cancellation and a central point for verification of certificates, when, what and where these might be had not been settled.¹³⁵

10.31 The advice that the Department of the Attorney General “*suspect[ed]*” that the central administration point would be the Magistrate’s Court administration raised questions as to how certificates issued by the District or Supreme Court in respect of offences prosecuted as indictable offences would be administered through the Magistrate’s Court.¹³⁶

10.32 The general response at the hearing was that, where necessary, these matters would be resolved through regulation. Mr Marshall advised the Committee:

*We expect that there will be regulations around the creation of certificates.*¹³⁷

10.33 However, section 494 proposes a regulation-making power limited to matters that are to be set out in a certificate.

10.34 In the absence of the final scheme for issuing certificates, the Committee confines its comment to noting the restrictive application of the regulation-making power.

11 PROPOSED AMENDMENT AND REVIEW OF POSITION ON INTERIM CERTIFICATES

Proposed amendment to regulation-making power

11.1 At the hearing, the Committee suggested that the regulation-making power required amendment if the intent were to enable cancellation of a certificate.

11.2 The Committee is pleased to report to the Legislative Council that the Attorney General has advised:

*I agree that this is a useful addition as the power to cancel a certificate must lie outside of the certificate itself. Appropriate drafting will be undertaken in this regard.*¹³⁸

Interim certificates

11.3 The provision for certificates to issue on conviction of an offence was explained at the hearing as a cautious approach designed to address the need for certainty as to the occurrence of the offence in light of the reliance that was to be placed on the

¹³⁵ Ibid, pp4-5.

¹³⁶ Ibid, p8.

¹³⁷ Ibid, p4.

¹³⁸ Letter from Hon Christian Porter MLA, Attorney General, 15 February 2010, p2.

certificates.¹³⁹ Issuing a certificate to persons who were victims of identity theft in the process of commission of an offence for which convictions had already occurred was seen as raising problems with retrospective application of legislation.¹⁴⁰

11.4 In his response, the Attorney General noted that, other than New South Wales, the legislation of other jurisdictions operate victim-certificate systems that are dependent on court conviction.

11.5 However, the Attorney General advised the Committee that he has:

*asked the Department to assess the feasibility of an interim certificate for victims of identity crime, one that could be issued without the resolution of a court decision or any other related processes, such as an appeal. As mentioned by my officers, this is a complex issue that involves possible elements of retrospectivity and the need for the proposed certificates to have a degree of explanatory power that would satisfy relevant organisations, such as financial institutions and banks.*¹⁴¹

11.6 The Committee notes that, as reported above, in its submission the Australian Finance Conference expressed its support for issue of a victim-certificate on the balance of probabilities prior to conviction and in the event that there was no conviction.



Hon Adele Farina MLC

Chairman

2 March 2009

¹³⁹ See Mr Andrew Marshall, Manager, Research and Analysis, Policy Directorate, Department of the Attorney General, *Transcript of Evidence*, 8 February 2010, p5.

¹⁴⁰ Ibid.

¹⁴¹ Letter from Hon Christian Porter MLA, Attorney General, 15 February 2010, p2.

APPENDIX 1
CRIMINAL CODE AMENDMENT (IDENTITY CRIME) BILL 2009

APPENDIX 1
CRIMINAL CODE AMENDMENT (IDENTITY CRIME) BILL 2009

Western Australia

Criminal Code Amendment (Identity Crime)
Bill 2009

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Western Australia

LEGISLATIVE ASSEMBLY

**Criminal Code Amendment (Identity Crime)
Bill 2009**

A Bill for

An Act to amend *The Criminal Code*.

The Parliament of Western Australia enacts as follows:

Criminal Code Amendment (Identity Crime) Bill 2009

s. 1

1 **1. Short title**

2 This is the *Criminal Code Amendment (Identity Crime)*
3 *Act 2009*.

4 **2. Commencement**

5 This Act comes into operation as follows —

- 6 (a) sections 1 and 2 — on the day on which this Act
- 7 receives the Royal Assent;
- 8 (b) the rest of the Act — on a day fixed by proclamation.

9 **3. *The Criminal Code* amended**

10 This Act amends *The Criminal Code*.

11 **4. Part VI Division III heading replaced**

12 Delete the heading to Part VI Division III and insert:

13
14 **Division III — Forgery and like offences: Identity**
15 **crime: Personation**
16

17 **5. Chapter LI inserted**

18 After Chapter L insert:

19
20 **Chapter LI — Identity crime**

21 **489. Terms used**

22 In this Chapter —

23 *digital signature* means encrypted electronic data
24 intended for the exclusive use of a particular person as
25 a means of identifying the person as the sender of an
26 electronic communication;

Criminal Code Amendment (Identity Crime) Bill 2009

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electronic communication has the meaning given in the *Electronic Transactions Act 2003* section 5;

identification information means information relating to a person, whether living or dead or whether real or fictitious, that is capable of being used, whether alone or in conjunction with other information, to identify or purportedly identify the person and includes —

- (a) a name, address, date of birth or place of birth;
- (b) information about a person’s marital status;
- (c) information that identifies a person as another person’s relative;
- (d) a driver’s licence number;
- (e) a passport number;
- (f) biometric data;
- (g) a voice print;
- (h) information stored on a credit card or debit card;
- (i) a financial account number, user name or password;
- (j) a digital signature;
- (k) a series of numbers or letters, or both numbers and letters, intended for use as a means of personal identification;
- (l) an Australian Business Number, as defined in the *A New Tax System (Australian Business Number) Act 1999* (Commonwealth);

identification material means —

- (a) identification information; or
- (b) a record that contains identification information;

voice print means electronic data recording the unique characteristics of a person’s voice.

Criminal Code Amendment (Identity Crime) Bill 2009

s. 5

1 **490. Making, using or supplying identification material**
 2 **with intent to commit indictable offence**

- 3 (1) A person who makes, uses or supplies identification
 4 material with the intention that the material will be
 5 used, by the person or some other person, to commit an
 6 indictable offence or to facilitate the commission of an
 7 indictable offence is guilty of a crime and is liable to
 8 the penalty that is the greater of —
 9 (a) imprisonment for 7 years; or
 10 (b) the penalty to which the person would have
 11 been liable if convicted of attempting to
 12 commit the indictable offence.

13 Alternative offence: s. 491(1).

- 14 (2) For the purposes of subsection (1), it does not matter
 15 that it is impossible in fact to commit the indictable
 16 offence.

- 17 (3) It is not a defence to a charge of an offence under
 18 subsection (1) involving identification material relating
 19 to a person other than the accused person that the other
 20 person consented to the making, use or supply of the
 21 identification material by the accused person.

22 **491. Possession of identification material with intent to**
 23 **commit indictable offence**

- 24 (1) A person who is in possession of identification material
 25 with the intention that the material will be used, by the
 26 person or some other person, to commit an indictable
 27 offence or to facilitate the commission of an indictable
 28 offence is guilty of a crime and is liable to
 29 imprisonment for 5 years.

30 Summary conviction penalty: imprisonment for
 31 24 months and a fine of \$24 000.

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- 1 (2) For the purposes of subsection (1), it does not matter
2 that it is impossible in fact to commit the indictable
3 offence.
- 4 (3) It is not a defence to a charge of an offence under
5 subsection (1) involving identification material relating
6 to a person other than the accused person that the other
7 person consented to the possession of the identification
8 material by the accused person.
- 9 **492. Possession of identification equipment with intent**
10 **that it be used to commit indictable offence**
- 11 (1) In this section —
12 *identification equipment* means any thing capable of
13 being used to make, use, supply or retain identification
14 material.
- 15 (2) A person who is in possession of identification
16 equipment with the intention that the equipment will be
17 used, by the person or some other person, to commit an
18 indictable offence or to facilitate the commission of an
19 indictable offence is guilty of a crime and is liable to
20 imprisonment for 5 years.
21 Summary conviction penalty: imprisonment for
22 24 months and a fine of \$24 000.
- 23 (3) For the purposes of subsection (2), it does not matter
24 that it is impossible in fact to commit the indictable
25 offence.
- 26 **493. Attempt offences do not apply**
- 27 Section 552(1) does not apply to an offence against
28 section 490, 491 or 492.

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- 1 **494. Court may grant certificate to victim of identity**
2 **offence**
- 3 (1) In this section —
- 4 *identification material*, of a victim, means
5 identification material relating to the victim;
6 *identity offence* means an offence against this
7 Division;
- 8 *victim*, of an identity offence, means a person whose
9 identification material has been used, without the
10 person's consent, in connection with the commission of
11 the offence.
- 12 (2) If a court convicts a person of an identity offence, the
13 court may issue a certificate to a victim of the offence
14 setting out —
- 15 (a) the identity offence to which the certificate
16 relates; and
- 17 (b) the name of the victim; and
- 18 (c) any matter prescribed by regulations made
19 under subsection (6); and
- 20 (d) any other matter the court considers relevant.
- 21 (3) The court may issue the certificate on its own initiative
22 or on an application made by the prosecutor or the
23 victim.
- 24 (4) Unless the offender is convicted of the identity offence
25 on a plea of guilty, the certificate must not be issued to
26 the victim until —
- 27 (a) the end of any period allowed for an appeal
28 against conviction; or
- 29 (b) if an appeal is commenced — the end of any
30 proceedings on the appeal.
- 31 (5) A certificate issued under this section is, in the absence
32 of evidence to the contrary, evidence of its contents.

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- 1 (6) The Governor may make regulations providing for any
2 matter to be set out in certificates issued under this
3 section.
4

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APPENDIX 2
LIST OF STAKEHOLDERS

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LIST OF STAKEHOLDERS

Ms Cheryl Gwilliam, Director General, Department of the Attorney General

Mr Brian Bradley PSM, Director General, Department of Commerce

Mr Bruno Fiannaca, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions

Mr David Price, Director, The Law Society of Western Australia

Sir/Madam, Criminal Lawyers Association of Western Australia

Dr Karl O'Callaghan APM, Commissioner of Police, Western Australian Police

Ms Pauline Vamos, Chief Executive Officer, The Association of Superannuation Funds of Australia Ltd

Mr Andrew Saxby, Chair, Abacus - Australia Mutuals

Mr David Bell, Chief Executive Officer, Australian Bankers' Association

Professor Mark Stoney, Head, School of Law and Justice Reception, Edith Cowan University

Mr Glenton Barton, Head, School of Business Law and Taxation, Curtin Business School, Curtin University of Technology

Professor Gabriël A Moens, Dean of Law, School of Law, Murdoch University

Professor William Ford, Dean, Faculty of Law, The University of Western Australia

Associate Professor Jane Powe, Dean, School of Law, The University of Notre Dame

Mr Russell Zimmerman, Executive Director, Australian Retailers Association

APPENDIX 3
FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

APPENDIX 3

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 4
MODEL CRIMINAL CODE - SECTION 3.3.5

APPENDIX 4

MODEL CRIMINAL CODE - SECTION 3.3.5

Model Criminal Code

Section 3.3.5

3.3.5 Credit card skimming and related offences

- (1) In this section:
personal financial information means information relating to a person that may be used (whether alone or in conjunction with other information) to access funds, credit or other financial benefits.
 - (2) A person who dishonestly obtains or deals in personal financial information without the consent of the person to whom it relates is guilty of an offence.
Maximum penalty: imprisonment for 5 years.
 - (3) For the purposes of this section:
 - i. obtaining personal financial information includes possessing or making any such information, and
 - ii. dealing in personal financial information includes supplying or using any such information.
 - (4) For the purposes of this section, a person is taken to obtain or deal in personal financial information without the consent of the person to whom it relates if the consent of the person is obtained by any deception.
 - (5) This section extends to personal financial information relating to a natural person or a body corporate, or to a living or dead person.
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APPENDIX 5
MODEL CRIMINAL CODE - SECTION 3.3.6 AND 3.3.7

APPENDIX 5
MODEL CRIMINAL CODE - SECTION 3.3.6 AND UNNUMBERED
SECTION

Model Criminal Code
Section 3.3.6 and Unnumbered Section

3.3.6 Identity fraud

(1) Definitions.

In this section:

deal in identification information, includes make, supply or use any such information

identification documentation means any document or other thing that contains or incorporates identification information and that is capable of being used by a person for the purpose of pretending to be, or passing himself or herself off as, another person (whether living or dead, real or fictitious, or an individual or a body corporate)

identification information means information relating to a person (whether living or dead, real or fictitious, or an individual or body corporate) that is capable of being used (whether alone or in conjunction with other information) to identify or purportedly identify the person, and includes the following:

- (a) a name or address,
- (b) a date or place of birth, marital status, relatives' identity or similar information,

- (c) a driver licence or driver licence number,
- (d) a passport or passport number,
- (e) biometric data,
- (f) a voice print,
- (g) a credit or debit card, its number, or data stored or encrypted on it,
- (h) a financial account number, user name or password,
- (i) a digital signature,
- (j) a series of numbers or letters (or both) intended for use as a means of personal identification,
- (k) an ABN.

(2) Dealing in identification information.

A person who deals in identification information with the intention of committing an indictable offence, or of facilitating the commission of an indictable offence, is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

(3) Possession of identification information.

A person who possesses identification information with the intention of committing an indictable offence, or of facilitating the commission of an indictable offence, is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

Possession of equipment used to make identification documentation.

(4) A person who possesses equipment that is capable of being used to make identification documentation, with the intention that the person or another person will use the equipment to commit an offence against this section, is guilty of an offence.

Maximum penalty: Imprisonment for 3 years.

(5) This section applies:

- (a) to a person who intends to commit, or facilitate the commission of, an offence even if committing the offence concerned is impossible or the offence concerned is to be committed at a later time, and
- (b) in the case of an offence against subsection (2) or (3), whether or not the person to whom the identification information concerned relates consented to the dealing in, or possession of, the identification information.

(6) Subsections (2) and (3) do not apply to dealing in, or the possession of, a person's own identification information.

(7) It is not an offence to attempt to commit an offence against this section.

Notes.

1. Alternative verdict provision under subsection (3) for persons who are charged with an offence against subsection (2) is a matter for each jurisdiction.

2. It is intended that the law of the local jurisdiction inform the meaning of “indictable offence” and related issues (including whether offences under the law of other jurisdictions are included and whether it is necessary to establish the status of the offence concerned).

Suggested additional provision for inclusion in the criminal procedure law of the relevant jurisdiction (adjustments will have to be made to reflect the manner in which Magistrates Courts are described in the relevant jurisdiction.)

Certificate may be issued by Local Court in relation to victim of identity crime

- (1) In this section, **victim** of an alleged offence under section 3.3.6, means a person whose identification information is the subject of an offence.
- (2) The Local Court may issue a certificate under this section if satisfied, on the balance of probabilities, that an offence against section 3.3.6 has been committed and that the certificate may assist with any problems the offence has caused in relation to the victim’s personal or business affairs.
- (3) The certificate is to:
 - (a) identify the victim of the offence, and
 - (b) describe the manner in which identification information relating to the victim was used to commit the offence.
- (4) The certificate may contain such other information as the Court considers appropriate.
- (5) The certificate is not to identify the perpetrator or any alleged perpetrator of the offence.
- (6) The Court may issue a certificate under this section whether or not:
 - (a) the perpetrator of the offence is identifiable, or
 - (b) any criminal proceedings have been or can be taken against a person in respect of the offence, or are pending.
- (7) The Court may issue a certificate under this section on the Court’s own initiative or on application by the victim of the offence.
- (8) The certificate is not admissible in any criminal proceedings in relation to the offence.

APPENDIX 6
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.
- Structure 7:** *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.
- Structure 8:** *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.
- Structure 9:** *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

